

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

Docket No. 77-1484

77-1484

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

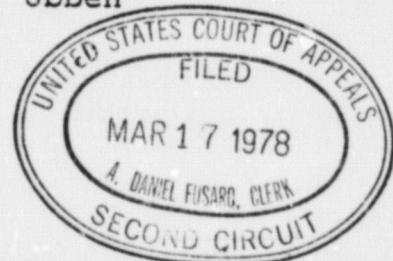
ARNOLD NELSON MAHLER and DEAN H. UBBEN,

Defendants-Appellants.

*B
p/s*

APPENDIX TO BRIEF FOR
DEFENDANT-APPELLANT
DEAN H. UBBEN

DAVID BLACKSTONE
401 Broadway
New York, New York 10013
Tel. No. 226-6684
Attorney for Defendant-Appellant
Dean H. Ubben



PAGINATION AS IN ORIGINAL COPY

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UBBEN, DEAN H.

A 1

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U.S. TITLE/SECTION		OFFENSES CHARGED		ORIGINAL COUNTS		SUPERSEDING COUNTS	
15:77(q)a,77x	Stock Fraud	1,4,6,7					
18:1343	Wire Fraud	2,5,9,11					
18:1341	Mail Fraud	3,8,12					
18:371	Consp. to commit stock fraud	13					

II. KEY DATES & INTERVALS			
ARREST or U.S. Custody Began	INDICTMENT ☒	ARRAIGNMENT	TRIAL
Summons Served	High Risk Date 11-11-76	11-18-76	Trial Set For
First Appearance	Indict. Waived ☐	1st Plea 11-18-76	Voir Dire ☐
	In Charging District	Final Plea	Trial Began ☐
	Superseding ☒ Indict/Info ☐		Trial Ended ☐
	10-4-77		

MAGISTRATE	
Search Warrant	Issued
Summons	Issued
Arrest Warrant	Issued
COMPLAINT	Issued
OFFENSE (In Complaint)	

DATE	INITIAL/NO.	INITIAL APPEARANCE DATE	INITIAL/NO.	OUTCOME
		PRELIMINARY EXAMINATION		
		REMOVAL OR HEARING		
		WAIVED ☐ NOT WAIVED ☐		
		INTERVENING INDICTMENT		

U.S. Attorney or Asst.

Jed S. Rakoff
791-0011

ATTORNEYS

EDWARD S. PARZER
299 B'way
N.Y.N.Y. 10007
Tel: 349-6128Defense ☒ CJA ☐ Ret. ☐ Waived ☐ Self ☐ None / Other ☐

* Show last names and suffix numbers of other defendants on same indictment/information

Bialek-06, Hughes-07, Bachmann-08, Knight-09, Dutzar-10

Mahler-01, Lovejoy-03, Greenberg-04, R

DATE	DOCUMENT NO.	PROCEEDINGS	EXCLUDABLE DELAY
11-11-76		Filed Indictment. B/W Ordered.....Cooper, J. B/W Issued.	
11-8-76		Filed deft's. unsecured PRB in the sum of \$10,000 - acknowledged by the Clerk.	
11-18-76		Deft. (atty. Edward H. Panzer present) (B/W vacated) pleads not guilty. Bail fixed at \$10,000 PRB unsecured. Ordered F/P. Deft. Ordered to turn over any and all passports in his possession to AUSA Rakoff. Case assigned to Frankel, J. for all purposes.....Cannella, J.	
11-23-76		Filed NOTICE OF APPEARANCE of Edward S. Parzer, 299 B'way, N.Y.N.Y. 10007, Tel: 349-6128.	
12/3/76		Filed MEMORANDUM for counsel. Motions should be filed not later than 12-20-76. So ordered Frankel, J. m/n	
12-3-76		Pre-trial Conference held.	3 12-3-76 E 1
2-1-77		Filed MEMORANDUM for counsel - trial is to begin at 10:00 AM 4-4-77. Requests to charge and voir dire requests are to be served and filed on or before March 28, 1977, etc. So ordered.	

DOCUMENT NO.	DESCRIPTION	EXHIBIT	DATE	FILED
-20-77	Filed One Large Brown Envelope containing Affidavit of Jed S. Radoff concerning material under 18 USC 3500 relating to Donna Jean Bright ordered sealed and impounded....FRANKEL, J.			
4-11-77	Trial began.			
4-12-77	" cont'd			
4-13-77	" "			
4-14-77	" "			
4-18-77	" "			
4-19-77	" "			
4-20-77	" "			
4-21-77	" "			
4-25-77	" "			
4-27-77	Filed One White Envelope ordered sealed and impounded. FRANKEL, J.			
4-26-77	Trial Cont'd.			
4-27-77	" "			
4-28-77	" "			
4-29-77	" "			
5-2-77	" "			
5-3-77	" "			
5-4-77	" Govt rest. Ct. 3 dismissed as to all defts. on trial.			
5-5-77	" "			
5-6-77	" "			
5-9-77	" "			
5-10-77	" "			
5-11-77	" Counts 11,12 & 13 as to all defts dismissed by court.			
5-12-77	" "			
5-13-77	" "			
5-16-77	" "			
5-17-77	" "			
5-18-77	" "			
5-19-77	" all parties rest.			
5-20-77	" "			
5-23-77	" "			
5-24-77---	" "			
5-25-77	" "			
5-26-77	" Due to illness and hospitalization of a juror - mis-trial is declared. Remaining defts on trial cont'd on bail as previously set. FRANKEL, J.			
6-9-77	Filed CJA 20 Appointment & voucher for counseling services, Copy # 5.			
6-22-77	Filed deft.'s questions for the voir dire.			
6-22-77	Filed Govt.'s voir dire requests.			
06-22-77	Filed notice that the action is reassigned to Judge Pollack. m/n			
06-29-77	Filed Govt.'s trial memorandum.			
06-29-77	Filed Govt.'s suppl. requests to charge.			
07-11-77	Pre-trial conf. held before Judge Pollack.			
7-20-77	Filed transcript of record of proceedings, dated Apr. 11, 12, 13, 14, 1977.			
7-20-77	Filed transcript of record of proceedings, dated Apr. 18, 19, 20, 21, 1977.			

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7-11

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RECORD NUMBER

CO NUMBER

DATE

RECORD

CO NUMBER

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE (a) (b)	
7-20-77	(Document No.) Filed transcript of record of proceedings, dated Apr 25, 26, 27, 1977.		
7-20-77	Filed transcript of record of proceedings, dated Apr. 28, 29, 1977. May 2, 3, 1977.		
7-20-77	Filed transcript of record of proceedings, dated May 4, 5, 6, 9, 1977.		
7-20-77	Filed transcript of record of proceedings, dated May 10, 11, 12, 9, 1977.		
7-20-77	Filed transcript of record of proceedings, dated May 16, 17, 18, 1977.		
7-20-77	Filed transcript of record of proceedings, dated May 19, 20, 23, 24, 1977.		
08-01-77	Filed MEMORANDUM- continuance granted pur. 18:3161(h)(8) ... trial set for 10-3-77. Pollack, J.	2	8-1
08-26-77	Filed CJA 20 appt. of counsel- Edward S. Panzer-299 Bway, NY, NY 10007-Tel: 349-6128. Connor, J. Issued All copies.		
08-26-77	Filed CJA 20 approval for payment of fees for atty. Edward C. Panzer. Frankel, J. Issued all copies.		
08-21-77	Filed transcript of record of proceedings, dated 07-11-77		
09-08-77	Filed Govt.'s proposed examination of prospective jurors.		
10-4-77	Filed Govt.'s memo. of law re: support of appl. to prohibit reference to prior acquittals of three co-defts.		
10-4-77	Filed Superseding Indictment & referred to Pollack, J.Stewart, J.		
10-11-77	Filed Govt.'s proposes pre-trial charge to the jury on securities terms and issues.		
10-12-77	Filed ORDER excusing juror Carlo Delfino, etc. Pollack, J. m/n		
10-11-77	Before Judge Pollack- jury trial begun as to both defts.		
10-12-77	Trial cont'd.		
10-19-77	Trial cont'd.		
10-19-77	Trial cont'd.		
10-14-77	Filed transcript of record of proceedings, dated 10-5-77.		
10-20-77	Filed Govt.'s request to charge.		
10-20-77	Trial cont'd.		
10-21-77	Trial cont'd. Motions of both defts. are denied.		
10-24-77	Trial cont'd.		
10-25-77	Trial cont'd.		
10-26-77	Trial cont'd. & concluded. Deft. found guilty as charged.		
	Deft. moves to set aside the jury verdict -denied. Govt.		
	moves for remand of deft. Mahler and for increase of bail of		
	deft. Ubben - denied. P.S.R. ordered. For sent. 12-8-77 at		
	10 AM. room 906 Deft. cont'd. on bail previously set.		
	Bail limits to include E.D.N.Y. S.D.N.Y. and Dist. of N.Jersey.		
	Pollack, J.		
11-10-77	Filed transcript of record of proceedings, dated Oct 11, 12, 13, 1977.		
11-10-77	Filed transcript of record of proceedings, dated Oct 20, 21, 24, 1977.		
11-10-77	Filed transcript of record of proceedings, dated Oct 25, 26, 1977.		
	Filed transcript of record of proceedings, dated Oct 6, 1977		
12-08-77	Deft.'s (atty. present) Govt's oral application for a		
12-09-77	nolle prosequi is granted. Pollack, J.		
	Filed deft.'s notice of appeal from judgment of 12-8-77.		
	mailed copies to U.S. Atty. & atty.		

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
12-08-77	(Document No.) Filed Judgment (atty. David Blackstone) 4 yrs. on cts.1,4,6,7 to run conc. 4 yrs. on cts.2,5,9,11 to run conc. 4 yrs. on cts 3,8,10,12 to run conc. 4 yrs. on ct. 13. Sentences on cts. 1,4,6,7,2,5,9,11 on the one and on each of cts.3,8,10,12 13 consecutively with each other for a total of 8 years. Deft. cont'd. on present bail terms pending the posting of bail pending appeal fixed at \$20,000. cash or surety, which is to be posted by 12-14-77 at 3PM. Pollack,J. issued all copies				

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- -x
UNITED STATES OF AMERICA :

- v - :

INDICTMENT

ARNOLD NELSON MAHLER :
(also known as "Arnold Nelson") :
and DEAN H. UBBEN, :

S. 76 Cr. 1047 (MP)

Defendants. :

----- -x

COUNTS ONE THROUGH TWELVE

The Grand Jury charges:

1. From in and around May, 1972 up to and including around June, 1973, in the Southern District of New York and elsewhere, ARNOLD NELSON MAHLER (also known as "Arnold Nelson" and hereinafter called "MAHLER") and DEAN H. UBBEN (hereinafter called "UBBEN"), the defendants, together with (in alphabetical order) Jarrold R. Bachmann, Edward Currie, Michael Dutzar, Craig Hanson, Harold Herman, John J. Hughes III, Billy B. Lovejoy, Stanley Needleman, David Norblom, Larry Plew, Maurice Rind, William Wellens, and Theodore Zucker (named in related Indictments and Informations as defendants and named here as co-schemers), Louis Kulekofsky (an unindicted co-schemer), and other co-schemers known and unknown to the Grand Jury, unlawfully, wilfully, and knowingly did devise and intend to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, to wit, a securities fraud scheme involving the fraudulent sale and concealed manipulation of the common stock of a company known as Industries International, Inc. (hereinafter "Industries International").

2. The object of the scheme was to unlawfully enrich MAHLER, UBBEN and their co-schemers through a sophisticated stock swindle which would defraud the public of more than a million dollars.

3. It was part of the scheme that MAHLER and UBBEN and their co-schemers would unlawfully and fraudulently create channels for the public sale of Industries International stock by such means, among others, as:

- bribing brokers;
- preparing false and misleading documents;
- concealing their control of substantial blocks of the stock;
- concealing their roles in the sale of the stock;
- fraudulently touting the stock to groups of stock-brokers and others; and
- falsely evading the federal registration requirements and other federal regulations governing the sale of securities.

4. It was part of the scheme that MAHLER and UBBEN and their co-schemers would generate an artificial demand for Industries International stock by such means, among others, as:

- misrepresenting the company's financial status and prospects through misleading financial statements, projections, and the like;
- concealing the fact that the company was losing money, had little or no net worth, and had a poor sales record;
- promising to deliver to prominent private investors "free and tradeable" shares of Industries International stock without revealing that such stock, which was never in fact delivered, could only have been delivered through the undisclosed and unlawful use of nominees; and,
- misusing the fact that the aforesaid prominent investors had been induced (in various fraudulent ways) to invest in the stock to, in turn, create interest in the stock among other less wealthy investors.

5. It was part of the scheme that MAHLER and UBBEN and their co-schemers would rig and manipulate the sale of Industries International stock, both in the public over-the-counter market and in various private sales, by such means, among others, as:

- bribing brokers and arranging for brokers and others to get undisclosed and unlawful kickbacks from the proceeds of their sales of stock;
- arranging for trades of Industries International stock to occur at pre-arranged prices and in pre-arranged, fixed, and rigged ways, rather than, as the law required, according to supply and demand and the independent decisions of investors;
- buying and selling stock, in excess of the legal limits, through the use of nominee accounts; and,
- "freeing-up" for sale, and attempting to free-up for sale, stock properly restricted from sale, by the undisclosed and unlawful use of nominees and the use of unlawfully obtained attorneys' opinion letters.

6. It was part of the scheme that MAHLER and UBBEN and their co-schemers would attempt to conceal the entire ongoing scheme from the investing public and from government investigators by such means, among others, as:

- removing any mention of their names from the publicly available documents relating to Industries International;
- funneling the proceeds of both public and private sales of Industries International stock through various nominee accounts;
- concealing bribes, pay-offs, and divisions of the proceeds of the fraud by a variety of fraudulent contrivances, such as, for example, payments purporting to be for other purposes;
- destroying brokerage account forms and substituting falsified forms in their places; and,
- devising false stories to be told by their co-schemers to government investigators.

STATUTORY AND JURISDICTIONAL ALLEGATIONS

7. On or about the dates set forth below, in the Southern District of New York and elsewhere, ARNOLD NELSON MAHLER (also known as "Arnold Nelson") and DEAN H. UBBEN, the defendants, together with their co-schemers, unlawfully, wilfully, and knowingly, and for the purpose of employing and executing and attempting to execute the fraudulent scheme and artifice set forth above did (a) cause certain matter to be placed in post offices and authorized depositories for mail matter, to be sent and delivered by the Postal Service and to be delivered according to the directions thereon, in violation of Title 18, United States Code, Sections 1341 and 2; (b) cause to be transmitted by means of wire and radio communication in interstate commerce certain writings, signs, signals, pictures and sounds, in violation of Title 18, United States Code, Sections 1343 and 2; and (c) use the means and instruments of transportation and communication in interstate commerce in the offer and sale of the stock of Industries International, Inc., in violation of Title 15, United States Code, Sections 77q(a) and 77x and Title 18, United States Code, Section 2; -- all as more particularly set forth below:

<u>COUNT</u>	<u>APPROXIMATE DATE</u>	<u>JURISDICTIONAL ACT</u>	<u>SECTIONS OF UNITED STATES CODE</u>
1	October 27, 1972	UBBEN travelled from out-of-state to meet with MAHLER and others at a hotel in Manhattan, where they discussed their division of Bell-Ko Film Corporation and Industries International stock.	15 U.S.C. §§ 77q(a), 77x; 18 U.S.C. § 2
2	November 29 - December 5, 1972	UBBEN caused the Beatrice State Bank in Beatrice, Nebraska to wire \$10,500 from his nominee "U.P. Ltd." account to an account of Harold Herman at the National Bank of North America, in Manhattan, the bulk of the proceeds of which were then distributed by Herman to nominee accounts of MAHLER and Zucker.	18 U.S.C. §§ 1343 and 2

<u>COUNT</u>	<u>APPROXIMATE DATE</u>	<u>JURISDICTIONAL ACT</u>	<u>SECTIONS OF UNITED STATES CODE</u>
3	December 8, 1972	Zucker mailed to shareholders of Bell-Ko Film Corporation in New York, N.Y. and elsewhere a proposal for Industries International to acquire Bell-Ko's assets that was prepared by UBBEN and Zucker according to directions and forms supplied by MAHLER, and which concealed MAHLER's and UBBEN's roles in the proposed reorganization.	18 U.S.C. §§ 1341 and 2
4	December 18, 1972	UBBEN travelled from out-of-state to the Bell-Ko shareholders' meeting held at the office of Harold Herman, Esq. in Manhattan which MAHLER, Zucker, and others also attended.	15 U.S.C. §§ 77q(a), 77x; 18 U.S.C. § 2
5	December 26, 1972 - January 9, 1973	UBBEN caused the First National Bank of West Des Moines to wire \$15,000 from the account of Larry J. Dowell to an account of Harold Herman at the National Bank of North America, in Manhattan, the proceeds of which were then distributed by Herman to nominee accounts of MAHLER and Zucker.	18 U.S.C. §§ 1343 and 2
6	January 14-17, 1973	UBBEN travelled from out-of-state to meet with Louis Kulekofsky in Manhattan, to finalize the funneling of a bribe of 50,000 shares of Industries International stock to Kulekofsky and Wellens, as per prior arrangements with MAHLER and Zucker.	15 U.S.C. §§ 77q(a), 77x; 18 U.S.C. § 2
7	February 6-8, 1973	UBBEN travelled from out-of-state to meet with MAHLER and others in a hotel in Manhattan, at which plans were made to provide UBBEN with at least 40,000 additional shares of unrestricted stock at \$1 per share.	15 U.S.C. §§ 77q(a), 77x; 18 U.S.C. § 2
8	February 8, 1973	Herman mailed from Manhattan to Mert Reese in Colorado, with carbon copies to MAHLER and UBBEN, a form opinion letter, to be used by UBBEN in freeing up his 180,000 shares of Bell-Ko Film Corporation stock through the undisclosed use of nominees.	18 U.S.C. §§ 1341 and 2

<u>COUNT</u>	<u>APPROXIMATE DATE</u>	<u>JURISDICTIONAL ACT</u>	<u>SECTIONS OF UNITED STATES CODE</u>
9	February 14, 1973	Wellens, at the office of P.J. Stanton & Company in Manhattan, called UBBEN, at the apartment of Tina Investment Company in Sullivan, Colorado, to discuss having Lawrence Bialek provide new financial statements for Industries International, so as to enable P.J. Stanton & Company to enter the "pink sheets" for trading of Industries International stock on the over-the-counter market.	18 U.S.C. §§ 1343 and 2
10	March 2-14, 1973	Saxon Securities mailed from Manhattan to MAHLER's corporation, Acquisitions & Investors, Ltd., in Melville, Long Island, confirmations for the sale to P.J. Stanton & Co. of 15,000 shares of the 20,000 shares of Industries International stock held by Saxon Securities on MAHLER's behalf.	18 U.S.C. §§ 1341 and 2
11	March 6, 1973	UBBEN, at the apartment of Tina Investment Company in Colorado, called Louis Kulekofsky, at the office of Lipkin, Gusrae & Held in Manhattan, to discuss further arrangements for the transfer of the 40,000 shares held at Duvest Securities in the Anted Vending nominee account of MAHLER and Zucker.	18 U.S.C. §§ 1343 and 2
12	April 6, 1973	MAHLER and Zucker caused a concealed pay-off in the form of a check for \$30,000 drawn on the account of Jefferson Retread Manufacturing Company and made out to Edward Currie to be transmitted to UBBEN and others in Colorado, where it was deposited in the Tina Investment account controlled by UBBEN and cleared for payment through the mails through New York, N.Y.	18 U.S.C. §§ 1341 and 2

(Title 15, United States Code, §§ 77q(a), 77x; Title 18, United States Code, §§ 1341, 1343, and 2.)

COUNT THIRTEEN

The Grand Jury further charges:

8. From in and around May, 1972 up to and including June, 1973, in the Southern District of New York and elsewhere, ARNOLD NELSON MAHLER (also known as "Arnold Nelson") and DEAN H. UBBEN, the defendants, together with others (hereinafter "co-conspirators") known and unknown to the Grand Jury, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to commit offenses against the United States, to wit, violations of Title 15, United States Code, Sections 77e, 77q(a), 77x, and of Title 18, United States Code, Sections 1001, 1341 and 1343.

9. Paragraphs 1 through 6 of this Indictment are hereby incorporated by reference and realleged as though fully set forth herein, as stating the objects of the conspiracy and the means by which the defendants and their co-conspirators carried it out.

STATUTORY ALLEGATIONS

10. It was part of the conspiracy that the defendants and their co-conspirators, unlawfully, wilfully and knowingly, directly and indirectly, would and did make use of the means and instruments of transportation and communication in interstate commerce and of the mails, to sell, and to offer to sell and to offer to buy, through the use and medium of prospectuses and otherwise, the common stock of Industries International, Inc., there being no registration statement in effect as to such securities: -- in violation of Title 18, United States Code, Sections 77e and 77x.

11. It was part of the conspiracy that the defendants and their co-conspirators, unlawfully, wilfully and knowingly, directly and indirectly, by use of means and instruments of transportation and communication in interstate

commerce and by use of the mails, in the offer and sale of the common stock of Industries International, Inc., would and did (a) employ devices, schemes, and artifices to defraud; (b) obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) engage in transactions, practices and courses of business which would and did operate as a fraud and deceit upon the purchasers of the stock of Industries International, Inc.: -- in violation of Title 15, United States Code, Sections 77q(a) and 77x.

12. It was further part of the conspiracy that the defendants and their co-conspirators, unlawfully, wilfully and knowingly, in matters within the jurisdiction of departments and agencies of the United States, would and did falsify, conceal and cover up by trick, scheme, and device, material facts, make false, fictitious and fraudulent statements and representations, and make and use false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries: -- in violation of Title 18, United States Code, Section 1001.

13. It was further part of the conspiracy that the defendants and their co-conspirators, unlawfully, wilfully and knowingly, would and did devise schemes and artifices to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and for the purpose of executing such schemes and artifices, and attempting to do so, would and did knowingly cause mail matter to be delivered according to the directions thereon and knowingly cause signals and sounds to be transmitted by means of wire and radio communication in interstate commerce: -- in violation of Title 18, United States Code, Section 1341 and 1343.

OVERT ACTS

14. Each of the jurisdictional acts set forth in the schedule at the end of paragraph 7 of the previous Counts of this Indictment are hereby incorporated by reference and realleged as though fully set forth herein, as constituting and describing some of the overt acts by which the defendants committed, in the Southern District of New York and elsewhere, the offense charged in this Count. In addition, in furtherance of the conspiracy and to effect its objects, the defendants also committed the following additional overt acts, among others, in the Southern District of New York, and elsewhere:

(a) On or about March 1, 1973, Edward Tiemers of A.B.S. Transfer Company delivered unlegended certificates for 80,000 shares of Industries International common stock to the office of Harold Herman, Esq. in New York, N.Y., which shares were thereafter sold and resold in the public market and the proceeds divided, directly and indirectly, by MAHLER, UBBEN, Zucker, Kulekofsky, Wellens, and Greenberg.

(b) On or about March 2, 1973, by pre-arrangement between various of the conspirators, 40,000 shares of Industries International stock was sold at 50¢ per share from Marvin Greenberg's account at John R. Potter & Company, in New York, N.Y., to MAHLER's and Zucker's "Anted Vending" account at Duvest Securities in New Jersey.

(c) In and around March 2-8, 1973, 20,000 shares of Industries International stock were sold from MAHLER's "Acquisitions & Investors" account at Saxon Securities, in New York, N.Y., to P.J. Stanton & Company and other brokers, for combined proceeds of more than \$65,000.

(d) On or about March 7, 1973, by pre-arrangement between MAHLER, UBBEN, Kulekofsky, and various other conspirators, 5,000 shares of stock in the "Anted Vending" account at Duvest Securities were sold to Louis Kulekofsky's account at P.J. Stanton & Company in New York, N.Y. at \$3.50 per share

and the remaining 35,000 shares in the "Anted Vending" account were sold to an account at the Central National Bank in Des Moines, Iowa at \$2 per share.

(e) In and around March 7-12, 1973 MAHLER and Zucker, at MAHLER's office in Long Island, arranged to have a new account form signed by Michael Sichel substituted for the original Anted Vending Company signed by MAHLER and Zucker.

(f) On or about March 13, 1973, MAHLER and Zucker delivered a cash payment to Kulekofsky at MAHLER's office in Melville, Long Island.

(g) On or about April 3, 1973, at MAHLER's office in Melville, Long Island, MAHLER and Zucker agreed to funnel \$30,000 to UBBEN in the form of a check from Jefferson Retread Company to Edward Currie that falsely purported to be for the purchase of HUP stock, and further agreed that Zucker would pay Kulekofsky approximately \$12,000 still owed him and Wellens as their bribes and kickbacks from this stock fraud.

(h) In and around early May, 1973, MAHLER met with Harold Herman and Greenberg at a coffee shop at Kennedy Airport, in Queens, N.Y., to devise a false story for Herman to tell government investigators.

(Title 18, United States Code, Section 371.)

FOREMAN

ROBERT B. FISKE, JR.
United States Attorney

1711

1 gwds 1

2 United States of America

3 -vs-

76 Cr. 1047

(MP)

4 Arnold Nelson Mahler, et al.

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New York, New York

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October 26, 1977--19:40 a.m.

8

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(Trial resumed)

Tk1

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(Jury present)

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THE CLERK: The Court is about to charge the jury. Any spectators wishing to leave the courtroom will do so now or remain seated until the completion of the Court's charge.

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Marshal, please lock the door.

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THE COURT: Ladies and gentlemen of the jury, I have observed the close and diligent attention that you have given to this case and your faithful attendance, and I want to thank you, each and every one of you, on behalf of the Court and on behalf of counsel and the parties.

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You undoubtedly realize that this is a very important legal matter. We have reached the concluding phase of the trial and the case will shortly be placed in your hands for a verdict. I shall now give you your final instructions which will guide your deliberations.

1 gwds 2

2 Briefly, as you have been told, the defendants
3 on trial have been charged by the government with criminal
4 offenses. They are set out for your consideration in a
5 legal paper called an indictment, a copy of which you have
6 received.

7 The effect of an indictment is to bring the
8 defendants to trial on the offenses of which they are
9 accused therein. This case calls for your response to the
10 indictment against Arnold Nelson Mahler and Dean Ubben.
11 You are not called to pass on the culpability of any others.
12 Your attention should not be distracted or diverted from
13 the specific task at hand.

14 The indictment in this case contains thirteen
15 separate charges, or counts, which you must consider. Each
16 count charges a separate crime, and both defendants are
17 charged with each and every one of these crimes. Each must
18 be considered separately as to each of the two defendants
19 on trial here. You must announce in your verdict the guilt
20 or non-guilt of each of the defendants on each count of the
21 indictment.

22 In the determination of whether or not there
23 is guilt, you must bear in mind that guilt is personal.
24 The guilt or absence of guilt of each defendant on trial
25 before you must be determined separately with respect to

1 gwds 3
2 each defendant.

3 It is your recollection of the evidence that
4 counts here and not the recollection of counsel and not my
5 recollection. The evidence is what came from the testimony
6 of the witnesses or from the exhibits admitted in evidence
7 and not from what counsel may have suggested by argument.

8 The evidence and the evidence alone is to be
9 your guide. It is for you to determine the weight that
10 you will extend to the witnesses who testified and the
11 reasonable inferences that are to be drawn from the evidence
12 that has been received.

13 From time to time in these instructions I
14 will refer to the government's contentions or the defense's
15 contentions under a particular count of the indictment.
16 However, I caution you that in doing so it is nonetheless
17 your recollection of all the evidence that controls and not
18 my statements or the way I marshal contentions.

19 You should consider all the evidence presented
20 before you, and even if I fail to mention a particular
21 contention or a particular fact to which a witness testified
22 or which was set out in an exhibit, that fact or contention
23 should still be reviewed by you and you must not infer from
24 the summary in these instructions that the Court accepts
25 or rejects certain parts of the record.

1 gwds 4

2 The function of believing or disbelieving
3 testimony or exhibits and of accepting or rejecting in-
4 ferences to be drawn from evidence lies squarely within
5 your province. The Court holds and expresses no opinion as
6 to the validity of any contentions made by the defendants
7 or by the government.

8 Although this trial has lasted for a number
9 of days and you have heard a great deal of oral testimony
10 as well as a considerable amount of documentary evidence
11 which has been received, yet the basic matters and the
12 issues submitted for your resolution are not complex or
13 difficult to grasp.

14 I will first outline the charges in the in-
15 dictment and then discuss those charges in detail.

16 The indictment, as I have told you, is a
17 statement of accusations. It is not proof of anything that
18 is said and nothing in it has evidentiary significance.
19 You are told by the indictment what the issues are that you
20 are going to be asked to decide.

21 The first twelve counts of this indictment
22 are the so-called fraud counts in that they allege violations
23 of what we describe in a shorthand way as mail fraud, wire
24 fraud and securities fraud statutes. Both Mahler and Ubben
25 are named in each and every one of the counts.

1 gwds 5

2 In order to find a defendant guilty under a
3 fraud count in which he is named, the government must
4 establish beyond a reasonable doubt the three following
5 essential elements:

6 First, that there existed a scheme or artifice
7 to defraud or to obtain money by false and fraudulent
8 pretenses, representations or promises in connection with
9 the offer or sale of stock of Industries International, Inc.
10 at or about the time alleged in the count.

11 Second, that the defendant knowingly and
12 wilfully helped devise and employed the scheme or artifice
13 to defraud, with knowledge of its fraudulent nature and with
14 the intent to defraud, or that a defendant knowingly and
15 intentionally aided and abetted others to do so.

16 And third, that the use of interstate travel
17 under Counts 1, 4, 6 and 7 -- don't worry about the numbers
18 at the moment because you will have them before you and we
19 will come back to that again -- that the use of interstate
20 travel under Counts 1, 4, 6 and 7, the use of interstate
21 wire facilities under Counts 2, 5, 9 and 11, and the use of
22 the mails under Counts 3, 8, 10 and 12 was involved in
23 carrying out the scheme or fraud.

24 Turning now to the first essential element
25 of the fraud counts. The charge here is that there was a

1 gwds 6

2 scheme, one of whose objectives was to commit a fraud. Now,
3 fraud is a sweeping conception. It is a term that embraces
4 all the possible means, however ingenious, clever or crafty,
5 by which a person seeks to gain some unfair advantage over
6 another person by intentional misrepresentation, false
7 suggestions, or suppression or concealment of the truth,
8 and so a scheme to defraud is any plan or design by which
9 one or more persons seeks to obtain money or property from
10 others, the members of the public, for example, by means
11 of representations that are intentionally false.

12 False representations, in turn, may be made
13 in two ways: First, by affirmatively stating facts as true
14 when the facts are not true, and second, by omitting or
15 concealing from what was said material facts that are
16 necessary to make what was said truthful.

17 All of you know from everyday life that a
18 statement may be literally true so far as it goes but it
19 may nevertheless convey a totally false picture if it omits
20 things that would be necessary to avoid misleading and
21 deceiving the person to whom the statement is made. In
22 other words, once a person undertakes to state certain facts
23 to another person, he has an obligation not to give a
24 distorted picture of the facts which renders his statement
25 misleading. Sometimes a half truth is no more honest than

1 gwds 7

2 an outright falsehood and, therefore, a scheme to make
3 false representations may be constituted by half truths
4 which are calculated to mislead.

5 For example, if you were to sell someone a
6 piece of land and tell him that it is a full acre of land
7 in sunny Florida, that might be all true so far as it goes,
8 but if you omitted to add that the land was ten feet under
9 water in the middle of a swamp, well, you would be defraud-
10 ing him just as surely as if you had affirmatively lied
11 to him. In short, the law provides that it is not enough
12 that what you say to a person before taking his money or
13 property is technically true. You have to give him in what
14 you say a true overall picture, and if you intentionally
15 leave out something important, what the law calls a material
16 fact, then you might very well be guilty of fraud.

17 The government charges that the scheme en-
18 gaged in by the defendants included both affirmatively false
19 statements and also statements that were false because of
20 what they failed or omitted to state. Indeed, some of the
21 charges that have been most in the forefront of this case
22 have been charges that either or both of the defendants
23 hid matters that they should have revealed. For example,
24 the government contends that Mahler and Ubben allegedly hid
25 the fact that the company, Industries International, was

1 gwds 8

2 financially destitute and that they allegedly hid the fact
3 that a broker allegedly was bribed to get the stock of
4 Industries International listed in the pink sheets for stock
5 trading purposes.

6 In assessing whether or not there was a
7 fraudulent scheme, you will want to take into account as
8 well the nature of the over-the-counter securities market,
9 that Congress intended that this market, like all regulated
10 markets in securities should operate as a free and open
11 public market and be free of artificial influence and
12 transactions which operate as a fraud on investors and the
13 public generally.

14 At this point I think it is appropriate that
15 I read to you the specific description of the alleged scheme
16 to defraud as it is set forth in paragraphs 2 to 6 of the
17 indictment, and perhaps you will want to follow along with
18 me in your copy.

19
20
21 (Continued on next page)
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23
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2 Paragraph 2 states the object of the scheme
3 was to unlawfully enrich Mahler, Ubben and their co-schemers
4 through a sophisticated stock swindle which would defraud
5 the public of more than a million dollars.

6 3. It was part of the scheme that
7 Mahler and Ubben and their co-schemers would unlawfully
8 and fraudulently create channels for the public sale of
9 Industries International stock by such means, among others,
10 as: Bribing brokers, preparing false and misleading
11 documents; concealing their control of substantial blocks
12 of stock; concealing their roles in the sale of stock;
13 fraudulently touting the stock to groups of stockbrokers
14 and others; and falsely evading the federal registration
15 requirements and other federal regulations governing the
16 sale of securities.

17 4. It was part of the scheme that Mahler
18 and Ubben and their co-schemers would generate an artificial
19 demand for Industries International stock by such means,
20 among others, as: Misrepresenting the company's financial
21 status and prospects through misleading financial statements,
22 projections, and the like; concealing the fact that the
23 company was losing money, had little or no net worth
24 and had a poor sales record; promising to deliver to
25 prominent private investors free and tradeable shares

1 hpbr 2

2 of Industries International stock without revealing that
3 such stock, which was never in fact delivered, could only
4 have been delivered through the undisclosed and unlawful
5 use of nominees; and, misuing the fact that the aforesaid
6 prominent investors had been induced in various fraudulent
7 ways to invest in the stock to, in turn, create interest
8 in the stock among the less wealthy investors.

9 5. It was part of the scheme that Mahler and
10 Ubben and their co-schemers would rig and manipulate the
11 sale of Industries International stock, both in the public
12 over-the-counter market and in various private sales, by
13 such means, among others, as: Bribing brokers and
14 arranging for brokers and others to get undisclosed and
15 unlawful kickbacks from the proceeds of their sales of
16 stock; arranging for trades of Industries International
17 stock to occur at pre-arranged prices and in pre-arranged,
18 fixed and rigged ways, rather than, as the law required,
19 according to supply and demand and the independent decisions
20 of investors; buying and selling stock, in excess of the
21 legal limits, through the use of nominee accounts; and,
22 freeing up for sale, in attempting to free up for sale,
23 stock properly restricted from sale, by the undisclosed
24 and unlawful use of nominees and the use of unlawfully
25 obtained attorneys' opinion letters.

1 hpbr 3

2 6. It was part of the scheme that Mahler
3 and Ubben and their co-schemers would attempt to conceal
4 the entire on-going scheme from the investing public and
5 from government investigators by such means, among others,
6 as: Removing any mention of their names from the publicly
7 available documents relating to Industries International;
8 funnelling the proceeds of both public and private sales
9 of Industries International stock through various nominee
10 accounts; concealing bribes, payoffs, and divisions of the
11 proceeds of the fraud by a variety of fraudulent contrivances,
12 such, as, for example, payments purporting to be for other
13 purposes; destroying brokerage account forms and sub-
14 stituting falsified forms in their places; and, devising
15 false stories to be told by their co-schemers to government
16 investigators.

17 Now you can put those papers down for the
18 moment.

19 The government is not required to prove
20 every misrepresentation or omission charged in these
21 paragraphs that I have just read. In fact, the government
22 is only required to prove that any one of those misrepre-
23 sentations or omissions was made.

24 To put it another way, the law says that it is
25 just as much a scheme to defraud if there is one misrepre-

1 hpbr 4

2 sentation or material omission as if there were many, and
3 even though the indictment charges many, the government
4 can carry its burden as to this first element of the crime
5 if it establishes beyond a reasonable doubt even just one.

6 In addition, let me instruct you that it is
7 not even necessary for the government to establish in this
8 case that any particular person actually relied on or
9 even actually suffered damages as a consequence of any
10 false statement or omission of any material facts. It
11 is enough if you find in this respect that a false statement
12 or statement omitting material facts was made as a part
13 of a fraudulent scheme in the expectation that it would
14 be relied on.

15 For example, if you find that the financial
16 statements for Industries International were false and
17 misleading and that they were issued in the expectation
18 that they would mislead brokers, the public and investors
19 generally into believing the company's financial position
20 was better than it really was, it is irrelevant that a
21 particular broker or a particular investor may not have
22 cared about the financial position of the company.
23 Or, to give another example, if you find that nominee
24 names and false documents were used in an attempt to
25 dupe the transfer agent, Tiemers, into freeing up stock

1 hpbr 5

2 for sale to the public, it is irrelevant whether or not
3 as to any given certificate of stock the transfer agent
4 was fooled.

5 I have used the word "material" in describing
6 the kind of false statements or omissions that are wrongful
7 under all of the laws with which you are concerned. We
8 use the word "material" to distinguish the kinds of state-
9 ments we care about from those that are of no real importance.

10 A material fact is one which could reasonably be
11 expected to be of concern to a reasonable and prudent person,
12 relying on the statement in making a decision. That
13 means if you find a particular statement of fact to have
14 been untruthful, before you can find that statement or
15 omission to be material, you must also find that the
16 statement or omission was one that would have mattered to
17 a reasonable person in making a decision.

18 In a rough way, the various misstatements
19 and omissions charged in the indictment fall into three
20 categories: Misrepresentations concerning the company,
21 Industries International; misrepresentations about its
22 stock; and misrepresentations about the way that the stock
23 was being traded.

24 An example of the first type is the charge in
25 the indictment that the true financial shape of the company

1 hpbr 6

2 was purposely concealed from the public and investors and
3 other interested persons such as brokers. If you wanted
4 to determine whether a finding that a misrepresentation
5 concerning the financial shape of the company was material,
6 you would ask yourself the question: Would knowledge of
7 the true financial position of the company affect the
8 decision of a reasonable investor whether or not to buy
9 stock in that company?

10 Similarly, an example of the second category
11 of misrepresentation charged here is a charge that the
12 defendant Ubben did not actually have any free and trade-
13 able stock when he sold it to various investors.

14 So, if there is a finding that the stock
15 sold was not of that kind, you would ask yourself the question:
16 If investors were told that that person did not have the
17 kind of stock he was purporting to sell them, would that
18 have affected their decision to pay him for the stock?

19 Finally an example of the third category of
20 the charge of misrepresentation is the charge that both
21 defendants secretly bribed brokers to list the stock for
22 trading in the pink sheets and to pre-fix the prices on
23 specific trades.

24 So, hereagain, if there is a finding of such
25 conduct and it was not disclosed, and thus operated as

1 hpbr 7

2 a misrepresentation of the freedom and openness of the
3 market, to decide if this was material, you would ask
4 yourself: Would a reasonable investor or a broker inter-
5 ested in buying or trading the stock in question be af-
6 fected in his decision whether or not to buy or trade the
7 stock by knowledge that the broker making the market
8 on the stock in the pink sheets had received secret pay-
9 ments to list the stock for trading and to pre-arrange the
10 prices of the trades for the benefit of the people
11 making his payments. If so, then the failure to mention
12 those payments and those pre-arranged sales constitute
13 material omissions.

14 The same principle applies to fraudulent
15 omissions as to fraudulent statements. If you find that
16 information was intentionally withheld or omitted, which
17 would, if disclosed, have changed the nature of the informa-
18 tion that was given, so that a reasonable person's decision
19 to act or not to act may have been different, then the
20 omission was material.

21 Everything that I have been telling you
22 about thus far relates to the first element of the crime
23 of fraud. That is, the existence of a fraudulent scheme.

24 at 2 am

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2 Before going on to the second element, let
3 me add one final observation.

4 If you find that there existed a scheme to
5 defraud, it is not necessary that you find, even if it
6 should be the fact, that anyone was actually defrauded or
7 that the defendants reaped any or all the proceeds from the
8 fraud. You concentrate on whether or not there was such a
9 scheme.

10 My point here is that while you are perfectly
11 free to take into account the fact that the scheme may have
12 succeeded in whole or in part, if you find such to be the
13 case, nevertheless it is not necessary for the government to
14 prove that the scheme succeeded and only that such a criminal
15 scheme was devised and employed.

16 The second essential element of the twelve
17 fraud counts is the requirement of proof that a defendant
18 participated in the fraudulent scheme wilfully and with in-
19 tent to defraud.

20 The word "participation" is a word that you
21 are all familiar with, and therefore I don't need to spend
22 much time defining that for you. Participating in a scheme
23 to defraud means associating oneself with it with a view
24 and intent to make it succeed. While a mere onlooker is
25 not a participant in a scheme to defraud, it is not necessary

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1 gwds 2

2 that a participant be someone who personally and visibly
3 executes the scheme to defraud. Indeed, in this case the
4 government contends that the defendants sought to conceal
5 their roles in the alleged fraud by, among other means,
6 getting others to do the out front, the actual work of, for
7 example, procuring the pink sheet listings and the brokers
8 with secret bribes. If you find that a defendant played
9 an essential role in putting the scheme together, that
10 would be sufficient to show participation.

11 Moreover, even if you found the scheme was
12 put together by others, you would be entitled to find that
13 the defendants had participated in the fraudulent scheme
14 if they knowingly and intentionally aided and abetted the
15 others in their employment or execution of the scheme.

16 This concept of aiding and abetting indeed
17 relates not just to the question of participation but to
18 each and every element of the charges in these fraud counts.
19 So let me digress for a moment to tell you about the legal
20 notion of aiding and abetting.

21 Section 2 of Title 18 of the United States
22 Code, which sets forth the calendar of crimes, separate
23 crimes, provides as follows:

24 "Whoever commits an offense against the United
25 States or aids, abets, counsels, commands, induces or

1 gwds 3

2 procures its commission (is guilty of that offense)."

3 And:

4 "Whoever wilfully causes an act to be done
5 which, if directly performed by him or another, would be
6 an offense against the United States (is guilty of that
7 offense)."

8 Thus, under the federal statute and under
9 this indictment, a defendant would be guilty if all of the
10 essential elements are shown even though he did not himself
11 directly and openly commit the offense in question if, in-
12 stead, you find he aided and abetted the commission of that
13 offense.

14 That means, of course, you cannot find a
15 defendant guilty of being an aider and abettor unless you
16 find the offense was actually committed, but by contrast
17 it does mean that you must find a defendant guilty if he
18 aided and abetted the commission of the offense even if he
19 was not the one who surfaced in and performed the trans-
20 action.

21 To decide whether a particular defendant aided
22 and abetted the commission of an offense, you ask yourself
23 these questions: Did he knowingly and wilfully associate
24 himself with the criminal venture? Did he knowingly and
25 wilfully participate in it in some or another way with the

1 gwds 4

2 purpose and intent to bring it about, even though he did
3 not accomplish the criminal misconduct directly or personally
4 Did he knowingly and wilfully, by his own action, intend
5 to help make that criminal enterprise succeed. If he did,
6 then you may find that the person in question is an aider
7 and abettor.

8 An act is done knowingly if it is done
9 voluntarily and purposely rather than accidentally or negli-
10 gently.

11 We say an act is wilful if, in addition to
12 being knowing in its performance, it is done deliberately.

13 It is not required that the government show
14 that a defendant in addition to knowing what he was doing
15 and deliberately doing it knew that he was violating some
16 particular law. He does not need to know the law whatsoever.

17 Before a defendant may be convicted of the
18 fraud charges here, he must be shown to have acted not only
19 knowingly and wilfully but also with the specific intent to
20 defraud. That means he must have engaged or participated
21 in the fraudulent scheme with some realization of its
22 fraudulent or deceptive character and with an intention to
23 be involved in the scheme to defraud and to help it succeed.

24 Now, all this talk about knowledge and intent
25 directs you to be concerned with the state of people's minds,

1 gwds 5

2 specifically, the minds of the defendants. We are commonly
3 called upon for serious reasons to make judgments about
4 what other people really think and believe and intend, and
5 we know from experience that we frequently cannot rely on
6 so-called direct evidence, pictures, when we are trying to
7 determine whether a person has or had such knowledge or
8 such intent.

9 We habitually consider, and you will consider,
10 all the non-direct or circumstantial evidence in deciding
11 whether the alleged intent to defraud has been made out
12 with respect to the defendant before you.

13 The existence or non-existence of guilty
14 knowledge is something commonly to be inferred from what I
15 call circumstantial evidence, distinguishing it from direct
16 evidence, and that means from a consideration of all the
17 circumstances that seem to rationally have a bearing on the
18 subject. You consider, in short, all the circumstances
19 and put them together in the whole setting of the case and
20 decide from all the evidence with respect to each defendant
21 separately whether he acted knowingly and wilfully as to
22 the events that are the subject of this case.

23 In judging knowledge and intent, you are
24 privileged to take account of what the law calls similar
25 acts evidence. Acts and conduct similar to those charged

1 gwds 6

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2 in the indictment, if you so find, may be considered
3 circumstantial evidence for the sole purpose of proving a
4 defendant's criminal knowledge and intent, plan and prepara-
5 tion but not for the purpose of showing criminal character.

6 You have heard two kinds of evidence of
7 alleged similar acts. One kind consisted of evidence of the
8 defendant Mahler's previous indictment and conviction for
9 participation in stock fraud offenses and his own testimony
10 admitting certain facts relating to those offenses, the
11 testimony given in another case that was read to you.

12 The other kind of evidence consisted of testi-
13 mony regarding the participation of Mahler and/or Ubben in
14 the attempted public distribution of a stock called HUP and
15 a stock called UGBI. That is called evidence of alleged
16 similar acts, and, as you will recall, some of it is said
17 to relate to Mahler, some to Ubben and some to both.

18 Now, as I instructed you when this evidence
19 was first offered, its admissibility is limited to and may
20 be considered solely on the issues in this case of criminal
21 intent or knowledge or plan or preparation or the absence
22 of mistake or accident on the part of the defendant or
23 defendants as to whom it was admitted in evidence. In
24 addition, you may consider Mahler's previous convictions
25 on the issue of his worthiness of belief as a witness, which

1 gwds 7

2 I will discuss with you later in my charge. However, you
3 may not consider evidence as direct proof of criminal
4 character.

5 In plain English, our law provides that each
6 case must be judged on its own merits and that the fact
7 that a person once acted illegally does not mean that he
8 thereafter necessarily acted illegally, but at the same
9 time the law likewise recognizes, and it is only common
10 sense, that if a man once demonstrated that he had the neces-
11 sary knowledge and intent to carry off a stock fraud, he
12 does not necessarily lose that knowledge and that capacity
13 with the passage of time and may, indeed, have acted with
14 identical knowledge and intent in a similar situation which
15 arises sometime thereafter, and you therefore may have reason
16 to be skeptical of his claims that he was an innocent dupe
17 when the allegedly same situation presents itself at a
18 later time.

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2 Closely tied up with your consideration
3 of a defendant's knowledge and intent is the question of
4 good faith. That is, each defendant here contends that
5 they acted throughout in good faith, and that if he did
6 participate at all in the commission of any fraudulent
7 scheme, it was not by design but out of a good faith belief,
8 however mistaken, in what he was saying or doing or in what
9 others were saying or doing in his behalf. The defendant
10 Ubben, for example, claims that he acted in good faith on the
11 basis of advice that he claims was given to him, such as
12 by the accountant Bialek or the lawyer Herman, as to the
13 transactions in which he was engaged. The government, for
14 its part, disputes that any such advice was ever given.

15 However, even if such advice were given,
16 and even if it were honestly relied on, which the govern-
17 ment also disputes, even then it would not necessarily
18 establish good faith, so as to negate the kind of knowing
19 and wilful misconduct required for a conviction. And that
20 is because the significance and utility of professional
21 advice must be appraised in terms of the completeness and
22 accuracy of the facts placed before the person giving the
23 advice. On the one hand, if an attorney or an accountant has
24 a full and candid picture of the facts of a transaction
25 or a proposed transaction and if the professional then

1 hphr 2

2 says that the person seeking the advice may legitimately
3 go ahead and engage in certain behavior, that would be
4 some indication that the person is not proceeding in bad
5 faith or with an intent to defraud or deceive anybody.

6 But on the other hand, you will realize that if critical
7 facts are withheld from the accountant or lawyer or
8 misstated, then the advice can scarcely be deemed to con-
9 stitute a basis for good faith reliance.

10 An example. If, as the Government claims,
11 Ubben withheld from Bialek the public use to which he
12 intended to put Bialek's financial statements, that would
13 deprive him of any claim of good faith reliance on those
14 statements, which Bialek marked "for internal use."

15 Similarly, if as the Government claims, Mahler
16 withheld from Herman any disclosure of his alleged non-compliance
17 with the three limitations on the sale of Mahler's stock
18 that are set forth in Herman's opinion letter, that would
19 deprive Mahler of any claim of good faith reliance on those
20 opinion letters.

21 Finally, in considering this overall question
22 of criminal knowledge and intent versus good faith, you
23 may find that a defendant acted with guilty knowledge and
24 intent if you find that the particular defendant you are then
25 considering acted with deliberate disregard for the true

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2 facts and with a conscious purpose to avoid learning the
3 truth, even though you may find that defendant was not
4 specifically aware of the true facts. Good faith may
5 be a defense, but self-delusion is not.

6 In other words, as you assess each
7 defendant's state of mind to determine whether he acted
8 wilfully and intentionally, I instruct you that the
9 law is that a defendant cannot avoid criminal liability by
10 deliberately closing his eyes to facts he had a duty to
11 see, or, by deliberately stating as facts things of which
12 he knew he was ignorant and by consciously avoiding the
13 discovery of the true facts of the matter. For example,
14 even if you were to find that Mahler, as he claims, was
15 not directly aware of all that Zucker and Kulekofsky were
16 doing with stock and companies in which he had an interest,
17 you would still have to consider whether this was innocent
18 ignorance or whether he purposely was avoiding finding out
19 the specifics of what was going on because he knew it
20 would prove to be fraudulent. If the latter was the case,
21 then you could still infer that he sufficiently had the criminal
22 intent to meet the requirements of the fraud charges here.

23 Similarly, a person who makes representations
24 without knowing or caring whether they are true or false
25 cannot be regarded as acting innocently. If you assert

1 hphr 4

2 something to be the case, the assertion carries with it the
3 implicit representation that you believe it to be true.

4 If you assert something to be true when in fact you have
5 no genuine belief that it is true, then the assertion is
6 misleading or deceptive. Even opinions carry with them
7 the implicit representation that they are honestly held.

8 For example, it is not necessary for the
9 Government to prove that the defendant knew to a certainty
10 that there was no legal way he could obtain, let alone sell,
11 free and tradeable Industries International stock when it
12 was unregistered. The required knowledge would be
13 established if you found that the defendant acted with
14 deliberate and wanton disregard as to whether he could
15 obtain such stock legally and with a conscious purpose
16 to avoid learning whether or not a person in his position
17 was forbidden from obtaining and selling such stock.

18 Some assertions carry with them an express or implied
19 representation that the person making the representation
20 knows that it is true. If the defendant intended for it
21 to be understood that what he said was true to his personal
22 knowledge, and intended for others to act on the basis of
23 what he said, then he acted with the requisite intent
24 if he did not know that what he said was true. In short,
25 the character of every act depends upon the circumstances

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2 in which it is done.

3 So, I say in sum that on the second and
4 essential element of the Counts 1 through 12, that is, the
5 element that the defendant acted knowingly, wilfully and
6 with fraudulent intent, it is for you finally to review
7 and put together all the circumstances in deciding whether
8 or not that element has been established beyond a reasonable
9 doubt with respect to the defendant you are considering.

10 Now I come to the third and final element of
11 the fraud counts, Counts 1 through 12 of the Indictment,
12 and that is the use of interstate travel, interstate wire
13 communication, and the mails in the employment and execution
14 of the fraudulent scheme. This third element is often
15 called the jurisdictional element, for the reason that the
16 federal government gets involved in the prosecution of
17 frauds only when there is some kind of interstate activity
18 or where the use of the mails is involved.

19 You may recall that I told you at the outset
20 of my instructions that three different fraud statutes are
21 involved in the fraud counts of this indictment: The
22 so-called securities fraud statute, wire fraud statute
23 and the mail fraud statute. For purposes of this case, the
24 first two elements needed for a conviction under any of
25 these statutes are identical, and that is why I have been

1 hpbr 6

2 able to describe those first two elements to you without
3 making any distinction between whether the charge
4 was under the securities fraud statute, the wire fraud
5 statute or the mail fraud statute. But when we come to
6 the third and final essential element, the jurisdictional
7 element, these three statutes become a little different
8 from one another in their requirements. Specifically,
9 the securities fraud statute requires some use of interstate
10 facilities and instrumentalities. The particular
11 facility or instrumentality which is charged in the counts
12 of this indictment falling under the securities fraud
13 statute is the use of interstate travel, that is to
14 say, airplanes, trains, and other modes of transportation
15 between states.

16 Next, the wire fraud statute requires some use
17 of interstate wire communication, and the particular
18 wire communications which are charged in the counts of this
19 indictment coming under the wire fraud statute are inter-
20 state telephone calls and interstate bank transfer wires.

21 Finally, the mail fraud statute requires
22 some use of the mails, whether between states or within
23 a single state, and the remaining fraud counts of this
24 indictment charge some such use of the mails.

25 Now, if you turn to paragraph 7 of the

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2 indictment, which is entitled "Statutory and Jurisdictional
3 Allegations," you will find, after some legal language,
4 a table, which is carried on over the next two pages as well,
5 listing the jurisdictional act for each and every one of
6 the twelve fraud counts and briefly describing why the
7 particular jurisdictional act is charged as having been
8 in furtherance of the overall fraudulent scheme. This
9 table is simply a listing of the third element, the juris-
10 dictional element for each of the counts. The rest of the
11 counts, the part that sets forth the first two elements
12 that are the same for all 12 counts, occupies the first
13 six paragraphs of the indictment, and this seventh para-
14 graph, with its table, is simply a listing of the third
15 element, the one respect in which the counts vary individual
16 one from another.

17 In particular, be sure to bear in
18 mind that, whether or not a particular defendant directly
19 participated in the jurisdictional use charged in a
20 specific count is irrelevant to his overall liability.
21 Both defendants are charged with each and every count of
22 this indictment, and you must render a verdict as to them on
23 each and every count.

24 Indeed, if you found that a defendant was
25 guilty of the first two elements of fraud, as I have

1 hpbr 8

2 previously explained them to you, you could find that
3 defendant guilty of a count of fraud even if he personally
4 had nothing whatever directly to do with the particular
5 jurisdictional use that was charged as having been committed
6 in furtherance of that fraud.

7 (Continued on next page.)
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2 Now, as it happens, both defendants' names
3 appear in most of the jurisdictional acts listed in this
4 table in paragraph 7, but this is not by any means a re-
5 quirement. There are one or two exceptions even in this
6 table. For example, if you look at the jurisdictional act
7 listed for Count 9, you will observe that it is a telephone
8 call from William Wellens, the salesman at P.J. Stanton &
9 Company, to the defendant Ubben, in which they are said to
10 have discussed having the accountant Bialek provide further
11 financial statements to get Industries International stock
12 trading in the pink sheets. And you will recall that Wellens
13 testified to having made such an interstate call, and his
14 testimony is supplemented by certain telephone toll records
15 that are in evidence that show a telephone call from P.J.
16 Stanton's number in New York to a number identified pre-
17 viously as the number for Tina Investment Company in
18 Sullivan, Colorado.

19 Now, my point is that even though that call
20 was allegedly made between Wellens and Ubben, the other
21 defendant, Mahler, would be just as liable on Count 9 if
22 you were to find that the call was made and was made in
23 furtherance of an overall fraudulent scheme in which he
24 intentionally participated.

25 So I say to you one last time both defendants

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1 gwds 2

2 are charged with each and every one of the fraud counts,
3 regardless of which of them is named as having directly
4 participated in the particular jurisdictional act listed
5 under a particular count.

6 Now if you were to turn to the form of verdict
7 that I have given you, the single piece of paper, you will
8 note that there is described thereon the counts falling under
9 the securities fraud statute and therefore involving charges
10 of use of interstate travel as 1, 4, 6 and 7; the counts
11 falling under the wire fraud statute and therefore involving
12 charges of use of interstate wire communications are
13 Nos. 2, 5, 9 and 11, which specifically refer to interstate
14 telephone calls; and the counts falling under the mail
15 fraud statute and therefore involving charges of use of the
16 mails, whether interstate or within a state, you will find
17 are referred to as 3, 8, 10 and 12.

18 Thus, there are four counts under each
19 statute and twelve fraud counts in all.

20 Incidentally, the particular count of the
21 mail charge in the final count, Count 12, involves the
22 clearing back through the mails following deposit of the
23 so-called Jefferson Retread check, Government Exhibit 97.
24 If you turn in your copy of the indictment to No. 12 under
25 paragraph 7, which is on the sixth page of the indictment,

1 gwds 3

2 you will see that it involves the clearing back through the
3 mails following deposit of the so-called Jefferson Retread
4 check, Government's Exhibit 97.

5 And in that respect I remind you that it has
6 been stipulated by the parties that the check did in fact
7 clear back from Denver, Colorado, to New York and ultimately
8 to Jefferson Retread in Long Island through a combination
9 of the mails and private delivery services. Whether, of
10 course, that check was drawn and deposited in furtherance
11 of the fraudulent scheme is, by contrast, the subject of
12 dispute between the parties, one of the many disputes that
13 you will have to resolve, but at least you will not have
14 to resolve the question of how and where that check cleared
15 back to Jefferson Retread. That much has been stipulated.

16 Now, even though these jurisdictional acts
17 differ from count to count, there are certain principles
18 applicable to them as a group which I will briefly mention
19 to you at this time.

20 First, in order to carry its burden on this
21 third element of each fraud count, the government must
22 prove beyond a reasonable doubt that the particular juris-
23 dictional act charged in each count was committed in execu-
24 tion or employment of the fraudulent scheme that constitutes
25 the first essential element of the offense rather than

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2 merely incidentally or without real connection to the
3 alleged fraudulent scheme. At the same time, the government
4 is not required to prove that the particular jurisdictional
5 act charged as having occurred was foreseen or intended by
6 either or both defendants. It is enough for conviction if
7 a defendant reasonably foresaw that in the execution and
8 employment of the fraudulent scheme, depending on the count,
9 some such use of interstate travel, interstate wire communi-
10 cation, or the mails was reasonably likely to occur.

11 Further, let me instruct you that in order
12 for a jurisdictional act to be in execution or employment
13 of the fraudulent scheme, it is not required that the act
14 itself be in any sense fraudulent. It may, indeed, be a
15 legal act. For example, the jurisdictional act charged
16 in Count 1 is that Ubben traveled to New York from out-of-
17 state to meet with Mahler and others in a hotel in Manhattan
18 where they planned certain aspects of the fraud.

19 Now, travel by itself is not fraudulent, of
20 course, but the charge is that the travel was a step toward
21 getting Mahler and Ubben together so that they could plan
22 aspects of the fraud. It is that kind of relation to the
23 fraud that is required, nothing more direct. Indeed, it
24 can be a good deal less direct so long as it is foreseeably
25 the kind of jurisdictional act that would occur in further-

1 gwds 5

2 ance of the fraud.

3 I have now completed the instructions to you
4 on the three elements that you must consider when judging
5 the fraud counts, that is, the first twelve counts of the
6 indictment, and I am about to turn to the remaining, the
7 thirteenth or final, count of this indictment, which charges
8 the two defendants with participation in a conspiracy.

9 I have been talking to you for a little while
10 and I would like to give you a chance to rest, maybe stand
11 up in your places and stretch and then we will continue.

12 (Pause)

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16 (Continued on next page)

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2 The thirteenth or final count of this indict-
3 ment charges the two defendants with participation in a
4 conspiracy. That is to say, a combination of persons schem-
5 ing in concert to achieve, or attempt to achieve unlawful
6 ends. The unlawful ends, or objects, of the conspiracy
7 charged in this indictment include not only the fraudulent
8 scheme previously described but also include scheming
9 allegedly to sell or attempt to sell unregistered stock and
10 make false statements to a governmental agency.

11 As with the fraud counts, there are essential
12 elements that must be satisfied beyond a reasonable doubt
13 before you can convict either or both defendants of con-
14 spiracy.

15 What is a conspiracy?

16 A conspiracy is a combination or agreement
17 of two or more persons by concerted action to accomplish a
18 criminal or unlawful purpose or else to accomplish some
19 purpose, not in itself criminal or unlawful, by criminal
20 or unlawful means.

21 The gist of the crime of conspiracy is the
22 unlawful combination or agreement to violate the law.

23 Whether or not those persons accomplished what it was that
24 they are alleged to have conspired or set out to do is im-
25 material to the question of guilt or innocence. Thus, the

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2 success or lack of success of the scheme does not matter,
3 for a conspiracy is a crime entirely separate and distinct
4 from the substantive crimes that may be the goal of the
5 conspiracy.

6 A conspiracy has sometimes been called a
7 partnership for criminal purposes to which every partner
8 becomes the agent of every other partner.

9 To establish a conspiracy the government is
10 not required to show that two or more persons sat around
11 the table and entered into a solemn pact orally or in writing
12 stating that they formed a conspiracy to violate a law,
13 setting forth the details of the plans, the means by which
14 the unlawful project is to be carried out, or the part to
15 be played by each conspirator. Indeed, it would be extra-
16 ordinary if there was such a formal document or specific
17 oral agreement. Your common sense will tell you that when
18 men and women in fact undertake to enter into a criminal
19 conspiracy much is left to the unexpressed understanding.

20 Conspirators do not usually reduce their
21 agreement to writing or acknowledge them before a notary
22 public, nor do they publicly broadcast their plans. From
23 its very nature, conspiracy is almost always characterized
24 by secrecy rendering detection difficult.

25 Thus, it is sufficient to establish a conspiracy

1 hpds 3

2 if two or more persons in any manner through any contrivance
3 impliedly or tacitly, come to a common understanding to
4 violate the law. Express language or specific words are
5 not required to indicate assent or attachment to a conspiracy.

6 On the other hand, proof concerning the
7 accomplishment of the objects of the conspiracy may be the
8 most persuasive evidence of the existence of the conspiracy
9 itself. To simplify this perhaps a bit more, success of
10 the venture, if you believe it was successful, is the best
11 proof of the venture or the agreement.

12 In determining whether there has been an un-
13 lawful agreement, you may take into account the acts and
14 conduct of the alleged members of the conspiracy which are
15 done to carry out an apparent criminal purpose. The adage,
16 "Actions speak louder than words" is here often applicable.
17 Usually the only evidence available is that of disconnected
18 acts on the part of the alleged individual conspirators,
19 which acts, however, when taken together in connection with
20 the reasonable inferences flowing therefrom, show a conspiracy
21 or agreement to secure a particular result as satisfactorily
22 and conclusively as more direct proof.

23 If upon consideration of the evidence, direct
24 or circumstantial, you find beyond a reasonable doubt that
25 the minds of the alleged conspirators met in an understanding

1 hpds 4

2 and that they agreed, as I have explained a conspiratorial
3 agreement' to you, to work together in furtherance of the
4 unlawful purposes alleged in the indictment, then proof of
5 the existence of a conspiracy is established.

6 Once satisfied that the conspiracy charged
7 existed, you must ask yourselves who its members were. In
8 deciding whether a defendant whom you are considering was
9 a member of the conspiracy, you should consider whether on
10 all the evidence such defendant knowingly and purposely
11 entered the conspiracy. You must determine whether the
12 conspiracy charged in the indictment existed between two
13 or more conspirators. To find a defendant guilty you must
14 find that he was a member of the conspiracy charged in the
15 indictment and not some other conspiracy.

16 In determining whether such defendant became
17 a member of the conspiracy, you must determine not only
18 whether he participated in it, but whether he did so with
19 knowledge of its unlawful purpose and the specific intent
20 to carry it forward as an associate or worker in it. Did
21 he join with awareness of at least some of the basic aims
22 and purposes of the conspiracy?

23 Knowledge is a matter of inference from facts
24 proved. It is not necessary that a defendant be fully in-
25 formed as to the details of the scope of the conspiracy in

1 hpds 5

2 order to justify any inference of knowledge on his part.

3 To have guilty knowledge a defendant need not
4 know in advance the full extent of the conspiracy and all
5 of its activities and actors. Of course, mere association
6 with a conspirator does not make one a member of a conspiracy
7 nor is knowledge without participation sufficient. What
8 is necessary is that a defendant participate with knowledge
9 of at least some of the purposes of the conspiracy and with
10 intent to aid in the accomplishment of those unlawful ends.

11 Once you have found the conspiracy to exist
12 and the defendant whom you are considering to have knowingly
13 and intentionally participated in it, the extent of his
14 participation has no bearing on his guilt or innocence.
15 The guilt of a conspirator is not measured by the extent or
16 the duration of his participation. Even if he participated
17 in it to a degree more limited than that of others of the
18 co-conspirators, he is equally culpable so long as he was,
19 in fact, a conspirator.

20 When people enter into a conspiracy to accom-
21 plish an unlawful end, they become agents for one another
22 in carrying out the conspiracy. Hence, the acts or declara-
23 tions of any conspirator knowingly made in the course of
24 the conspiracy and in furtherance of the common purpose can
25 be considered by you against any defendant found to be a

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2 member of the same conspiracy, even in his absence and
3 without his knowledge, providing that the actions and declara-
4 tions were done or made during the continuance of the same
5 conspiracy and in furtherance of some object or purpose
6 thereof.

7 The final essential element of the crime of
8 conspiracy is that an overt act to effect the object of the
9 conspiracy be committed by at least one of the co-conspirator.
10 Why is this necessary? The concept of conspiracy is schem-
11 ing. Suppose you have scheming and nothing is done to
12 carry out the scheme, no objective overt act to carry out
13 the scheme. Then the charge of conspiracy must fail, other-
14 wise we would be having thought control only.

15 You must have some overt act, whether an inno-
16 cent act or guilty act, providing that act was done during
17 the course of the scheme and in furtherance of some object
18 of it. Thus, if one were to say a person walked from here
19 to Broadway, that in itself might be an innocent act; but
20 in the circumstances of the alleged conspiracy, that act
21 may achieve something as an integral or essential part of
22 carrying out the purpose.

23 An overt act is any step, action or conduct
24 which is taken to achieve, accomplish or further the objec-
25 tive of the conspiracy.

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2 Once conspirators move forward down the road
3 to putting their unlawful plan into action, then the law
4 says that they are acting dangerously and against the public
5 good and deserve to be punished.

6 Each of the twelve jurisdictional acts that
7 we went over in connection with the fraud counts is realleged
8 and incorporated by reference in the conspiracy count as
9 being overt acts in furtherance of the conspiracy, but, in
10 addition, the conspiracy count specifies eight additional
11 overt acts which we shall now read together, if you will
12 turn to them in the indictment.

13 You will find under the heading of "Overt
14 Acts" on the next to the last page of the indictment the
15 following. The first of those overt acts is in paragraph
16 14, sub-division (a). You will note that the charge of the
17 grand jury which has to be established beyond a reasonable
18 doubt is that:

19 "In addition, in furtherance of the conspiracy
20 and to effect its objects, the defendants also committed the
21 following additional overt acts, among others, in the
22 Southern District of New York, and elsewhere:"

23 And then sub-division (a).

24 "On or about March 1, 1973, Edward Tiemers
25 of ABS Transfer Company delivered unlegended certificates

1 gwds 2

2 for 80,000 shares of Industries International common stock
3 to the office of Harold Herman, Esq. in New York, N.Y.,
4 which shares were thereafter sold and resold in the public
5 market and the proceeds divided, directly and indirectly,
6 by Mahler, Ubben, Zucker, Kulekofsky, Wellens and Greenberg.

7 "(b) On or about March 2, 1973, by pre-
8 arrangement between various of the conspirators, 40,000
9 shares of Industries International stock was sold at 50 cents
10 per share from Marvin Greenberg's account at John R. Potter
11 & Company, in New York, N.Y., to Mahler's and Zucker's
12 Anted Vending account at DuVest Securities in New Jersey,

13 "(c) In and around March 2-8, 1973, 20,000
14 shares of Industries International stock were sold from
15 Mahler's Acquisitions and Investors account at Saxon
16 Securities, in New York, N.Y., to P.J. Stanton & Company
17 and other brokers, for combined proceeds of more than
18 \$65,000.

19 "(d) On or about March 7, 1973, by pre-
20 arrangement between Mahler, Ubben, Kulekofsky, and various
21 other co-conspirators, 5000 shares of stock in the Anted
22 Vending account at DuVest Securities were sold to Louis
23 Kulekofsky's account at P.J. Stanton & Company in New York,
24 N.Y. at \$3.50 per and the remaining 35,000 shares in the
25 Anted Vending account were sold to an account at the Central

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2 National Bank in Des Moines, Iowa at \$2 per share.

3 "(e) In and around March 7-12, 1973, Mahler
4 and Zucker, at Mahler's office in Long Island, arranged to
5 have a new account formed signed by Michael Sichel substituted
6 for the original Anted Vending Company signed by Mahler and
7 Zucker.

8 "(f) On or about March 13, 1973, Mahler and
9 Zucker delivered a cash payment to Kulekofsky at Mahler's
10 office in Melville, Long Island.

11 "(g) On or about April 3, 1973, at Mahler's
12 office in Melville, Long Island, Mahler and Zucker agreed
13 to funnel \$30,000 to Ubben in the form of a check from
14 Jefferson Retread Company to Edward Currie that falsely
15 purported to be for the purchase of HUP stock, and further
16 agreed that Zucker would pay Kulekofsky approximately
17 \$12,000 still owed him and Wellens as their bribes and kick-
18 backs from this stock fraud.

19 "(h) In and around early May, 1973, Mahler
20 met with Harold Herman and Greenberg at a coffee shop at
21 Kennedy Airport, in Queens, N.Y., to devise a false story
22 for Herman to tell government investigators."

23 I want to remind you that it is only necessary
24 for you to find proof of just one of the overt acts in order
25 to satisfy the overt act element of the conspiracy. One

1 gwds 4

2 open act as a step to further the conspiracy is enough,
3 and many are here alleged, but proof of one is the only
4 essential requirement.

5 While we are on the subject of overt acts,
6 this is a good opportunity to bring to your attention that
7 the law only requires a substantial similarity between the
8 dates alleged in the indictment and the dates established
9 by the testimony or exhibits.

10 The same goes for most of the other factual
11 contentions in the indictment. For example, whether the
12 indictment says \$65,000 and it turns out just to be \$64,957
13 is totally immaterial. As long as there is substantial
14 similarity between the indictment and the proof, that is
15 enough.

16 The conspiracy count, when you get around to
17 reading it, you will find charges a conspiracy to violate
18 several statutes, specifically the mail fraud, wire fraud,
19 and securities fraud statutes, with which you are already
20 familiar, as well as two other statutes I shall now describe.

21 When I say a charge in a conspiracy to violate
22 the statutes, I do not mean that anyone contends that the
23 alleged conspirators knew the actual statutes involved.
24 What is charged is that they planned to carry out concerted
25 unlawful activity which, if carried out, would have violated

1 gwds 5

2 those statutes.

3 Furthermore, as I told you previously, it is
4 sufficient for you to find that their plan or conspiracy
5 embraced activity that would have violated any one of those
6 statutes. It is not necessary that you find that it would
7 have violated more than one.

8 Now, as I said, since you are already familiar
9 from our discussion of Counts 1 to 12 with three fraud
10 statutes, no further instructions are needed in that regard.
11 But I want to say a word now about the other two statutes
12 mentioned as objects of the conspiracy since we have not
13 previously discussed them.

14 The first of these statutes, the false
15 statement statute, which is referred to in paragraph 12
16 of the indictment -- paragraph 12 is the third from the last
17 page of the indictment -- is rather straightforward.
18 Specifically, the underlying statute, the False Statement
19 Act, provides as follows:

20 "Whoever in any matter within the jurisdiction
21 of any department or agency of the United States knowingly
22 and wilfully falsifies, conceals, or covers up by any trick,
23 scheme or device a material fact, or makes any false,
24 fictitious or fraudulent statements, or representations,
25 or makes or uses any false writing or document knowing the

1 gwds 6

2 same to contain any false, fictitious or fraudulent state-
3 ment or entry (is guilty of a criminal offense)."

4 The government charges here in paragraph 12
5 that the defendants conspired, schemed, plotted to violate
6 that statute, and not that they necessarily committed the
7 substantive offense specifically.

8 The government contends that when, for example,
9 Harold Herman allegedly made false statements to the SEC
10 about when he met with Greenberg, he was allegedly acting
11 pursuant to a plan worked out with the defendant Mahler
12 and Greenberg at Kennedy Airport.

13 To give another example, the government con-
14 tends when the Anted Vending forms bearing the name Michael
15 Sichel were allegedly substituted for the real forms, that,
16 too, was pursuant to an alleged plan of action in which
17 Mahler allegedly participated. So that even though Mahler
18 did not commit the substantive offense, he was, according to
19 these allegations, part of a conspiracy to commit them.
20 Similar allegations are made as to Ubben.

21 Since the terms of the False Statement Act
22 are either clear on their face or have already been defined,
23 it remains only to add that to make out a violation of
24 conspiring to violate the false statement statute the
25 prosecution would have to prove beyond a reasonable doubt

1 gwds 7

2 that it was an object of the conspiracy to make false state-
3 ments or submit false documents in a matter within the
4 jurisdiction of a department or agency of the United States.
5 As a matter of law, I will tell you that an investigation
6 of alleged Security Act violations is a matter within the
7 jurisdiction of the SEC, which is an agency of the United
8 States.

9 Finally, paragraph 10 of the indictment under
10 the heading of "Statutory Allegations" lists as still
11 another possible object of the conspiracy the violation of
12 the laws prohibiting the sale of unregistered stock.

13 Some of you may recall that these laws were
14 the subject of my brief instructions to you at the very
15 start of this case. As I told you then, following the
16 crash of the stock market in 1929, Congress passed a law
17 called the Securities Act of 1933, designed to protect the
18 investing public and the public generally from the kinds
19 of deceptions and concealments in the sale of securities
20 that are supposed to have helped to lead us to the great
21 Depression.

22 The Securities Act of 1933 created a compre-
23 hensive plan to promote full and fair disclosure in the
24 offer and sale of securities.

25 One part of this plan was the securities fraud

1 gwds 8

2 statute, which we have already discussed. That statute is
3 actually one section of the Securities Act of 1933.

4 But another provision of the same Act was the
5 requirement that securities be registered with the SEC be-
6 fore they are distributed in public sale. Indeed, the
7 registration provision is often said to be the first line
8 of defense in guaranteeing full and fair disclosure, because
9 it provides that at the very outset, before a company ever
10 starts selling its securities to the public, whether on the
11 stock exchange or over-the-counter markets, it must file a
12 registration statement with the SEC, and that statement must
13 disclose fully and truly a large number of facts about the
14 nature of the company and its stock, the persons actually
15 in control of the company and its stock, the true financial
16 condition of the company, its reasonably anticipated
17 prospects for the future and a good deal more.

18 I should mention in this connection that the
19 registration requirement of the Securities Act was thought
20 to be necessary because securities are, by their very
21 nature, quite different from other types of merchandise for
22 which there are established public markets. You know that
23 when you want to buy a new car or a household appliance or,
24 for that matter, a house, you can to some extent determine
25 from personal inspection the quality of the product and the

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2 reasonableness of the price in relation to other competing
3 products, but that is not so with respect to a share of
4 stock.

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2 As a practical matter, it is not possible for
3 the average investor to differentiate between securities
4 of little or no value, those of a highly speculative
5 nature and those offering at least reasonable prospects
6 of a satisfactory return on his investment. He cannot
7 himself make such distinctions because the average person
8 generally is unable to make a personal investigation of the
9 properties and operations of the company issuing this
10 stock.

11 He must, therefore, rely upon available
12 oral and written information about the company, its
13 financial condition, its assets, its management, its oper-
14 ations, its products, its resources, its prospects and the
15 terms and conditions respecting its securities.

16 Congress believed that by requiring a de-
17 tailed statement of such information to be made available
18 to investors and also to be filed and submitted to the
19 scrutiny of the SEC, prior to any sale of any securities,
20 investors would at least be assured of disclosure of certain
21 important facts about a company and its stock before they
22 ever invested.

23 Now, all of this is by way of prelude to
24 the fact that one of the charges in the conspiracy here
25 is that the defendants conspired and schemed to sell

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2 unregistered stock. This charge also comes up, in
3 slightly different fashion, in the fraud counts.

4 Specifically, in describing the scheme to defraud, the
5 indictment charges that as part of that scheme, the defend-
6 ants purposely violated the registration requirements.

7 Of course, that was was only one small part of the scheme
8 charged, and as I instructed you earlier, it is not necessary
9 for you to find that every part of a fraudulent scheme
10 as charged in the indictment is established by the proof;
11 it is sufficient if the proof establishes any one material
12 part of that fraudulent scheme.

13 But now, in the conspiracy count, this
14 question of registration arises again, not as part of any
15 scheme to defraud, but rather as a pure allegation that
16 the defendants conspired to sell unregistered stock,
17 regardless of whether they did so as part of a scheme to
18 defraud or otherwise. Now this is only one of the five
19 objects of the conspiracy charged in the indictment and
20 I remind you again that it is sufficient if you find that
21 any one of the objects is established by the proof;
22 nevertheless, since this is one possible such object,
23 it behooves us to say a few words about what must be
24 established to prove that the sale of unregistered stock
25 was an object of the alleged conspiracy.

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2 In order to establish such an object, the
3 government must prove that the defendants intended to sell
4 stock of Industries International, knowing that it was
5 unregistered and knowing that such registration was required
6 before distribution of the stock in sales to the public.

7 There is no real dispute, as I recall, over
8 the fact that Industries International stock was in
9 fact never registered. You must, however, first
10 ascertain whether, as part of any alleged conspiracy,
11 a defendant knew this. For example, was the fact that
12 most of the stock bore on its face a stamp or legend
13 saying it was unregistered sufficient to alert either or
14 both defendants to the fact? That is the kind of question
15 you must ask yourselves. If you decide that a defendant
16 knew that the stock was unregistered and that, nonetheless,
17 he entered into a conspiracy or combination to sell it,
18 the other question you must ask yourself is whether the
19 defendant, at the time he was acting within this conspiracy,
20 knew that the stock had to be registered before he could
21 sell it. For example, despite the stamp or legend
22 saying that the stock could not be sold, he might be totally
23 ignorant of the requirement.

24 Or, even if fully aware of this requirement,
25 he might have in good faith believed that an exemption

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2 or exception from registration was available to him in the
3 sale of this stock.

4 As it happens, the defendants here variously
5 claim that two exemptions were available to them or that
6 they so believed at the time. As to their Industries
7 International shares that were formerly Bell-Ko shares of
8 which, I believe, it is undisputed, the defendant Mahler
9 sold a large amount and the defendant Ubben attempted
10 to sell an even larger amount, the defendants claim that
11 their sales or their attempted sales were exempt from
12 registration under former Rule 133, promulgated by the
13 SEC. That rule provided that in the case of a
14 reorganization merger such as you have had described to
15 you in this case, between a public corporation like Bell-Ko
16 and a private corporation like Industries International,
17 certain shares remained eligible to be sold to the public
18 without further registration. However, that exemption
19 under Rule 133 would not be applicable to any shares held
20 by Mahler and Ubben if any one of the following conditions
21 was present:

22 (a) There were bribes to brokers in con-
23 nection with sales of such shares;

24 (b) There were fixed or rigged prices
25 or other pre-arrangements in connection with the sales of

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2 such shares.

3 (c) More than 40,000 shares were sold,
4 directly or indirectly, by the conspirators, whether
5 acting individually or jointly and whether acting in
6 their own names or in the names of nominees;

7 (d) There was no valid reorganization between
8 Bell-Ko and Industries International prior to the expir-
9 ation of Rule 133, which expired on December 31, 1972, or
10 if there was no such valid reorganization because the
11 Bell-Ko shareholders or some of them were not accurately
12 apprised of the real facts underlying the proposed merger
13 or because the board of directors of Industries Inter-
14 national never approved the proposed offer to the
15 Bell-Ko shareholders until, if ever, January 1973 and if
16 the minutes which purported to show they approved it in
17 November 1972 were actually backdated and false or for
18 both of those reasons, then Rule 133 could not be relied
19 upon as an exemption.

20 (e) If the reorganization of Bell-Ko and
21 Industries had no genuine independent business purpose
22 of its own, but was simply a step in a plan to distribute
23 securities to the public without having to register them,
24 then Rule 133 as an exemption, it would not be applicable.

25 If the persons organizing the reorganization

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2 of Bell-Ko and Industries International had sufficient
3 control of the voting stock to make a vote of Bell-Ko
4 stockholders a mere formality, then Rule 133 would not
5 be applicable.

6 And finally, if the reorganization of the
7 Bell-Ko and Industries was simply one step in an overall
8 fraudulent scheme, Rule 133 could not be relied upon.

9 So, if you were to find that even just one of
10 those seven conditions that I have just called to your
11 attention was present, that one would destroy any claim
12 of there being a valid exemption under Rule 133. You
13 would still have to consider whether, notwithstanding the
14 absence of any valid exemption, one or both defendants
15 still in good faith believed that was a valid exemption
16 under Rule 133, and that in turn would depend on your
17 overall analysis of all the facts and circumstances bearing
18 on a defendant's intent and good faith, something I have
19 previously discussed with you in detail and therefore I need
20 not go over it again.

21 The other exemption on which there is said to
22 be some reliance in this case is the so-called private
23 placement exemption. On the facts of this case, this
24 exemption has application, if at all, only to the defendant
25 Ubhen and only to the restricted stock he sold. It has no

1 hpbr 7

2 application to any of the stock charged as having been
3 sold by Mahler, nor does it relate to any of the so-called
4 free and tradeable stock that Ubben purportedly sold.
5 But the claim here is that Ubben believed, when he
6 and those associated with him sold restricted stock in
7 private transactions out in the Midwest, that those
8 sales were exempt from registration because they involved
9 alleged private offerings of restricted stock to a limited
10 number of persons who were fully apprised of what the
11 company was all about. The reason for this so-called
12 private placement exemption is that there sometimes exists
13 a narrow group of private investors who are in a position
14 to know, or who find out directly from the company, all
15 the kinds of information that would normally be disclosed
16 in a registration statement; therefore, as to them, there
17 is no need for the protections afforded by the requirement
18 of registration. But they cannot, in turn re-sell
19 their stock to the uninformed public; hence it is restricted
20 from sale.

21 In assessing, therefore, whether the people
22 to whom Ubben sold restricted stock fit this exemption,
23 you have to look to both what their situation was and what
24 were Ubben's intentions towards them.

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Mahler

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2 If you were to find that some or all of these

3 people did not in fact have access to the material facts

4 about the company, such as its true financial condition,

5 the persons actually in control of the stock and facts of

6 that kind, then there could be no private placement exemp-

7 tion. And even if you were to find that they did have

8 access to all such material information, you would have to

9 look to see whether it was Ubben's intention to sell to

10 them as a limited group of private investors to whom he

11 would supply such information, or whether it was his inten-

12 tion to sell to anyone he could interest in buying the

13 stock, regardless of their access to information, their

14 situation, their sophistication, and the like. If you found

15 Ubben's intention was simply to sell the stock to whomever

16 he could, regardless of their situation and so forth, then

17 again you have to conclude that there was no basis for a

18 private placement exemption.

19 Even if no private placement exemption existed,

20 you would have to consider whether Ubben in good faith be-

21 lieved that one did. But that again would depend on all

22 the facts and circumstances. I have already spoken to you

23 about the good faith reliance on lawyers and its unavail-

24 ability where the attorney is not told material facts.

25 The mere fact that he may have hoped or deluded

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1 gwds 2

2 himself into thinking that such an exemption existed would
3 not support a finding by you of his having a good faith
4 belief in the existence of such an exemption. The law
5 requires something more substantial than that. Otherwise,
6 enforcement of the registration provisions would constitute
7 a nullity.

8 I now want to turn to some general instruc-
9 tions that will guide you in your assessment of the overall
10 evidence in this case.

11 Each defendant before you has pleaded not
12 guilty. That means that the government has the burden of
13 proving guilt beyond a reasonable doubt with respect to
14 every material element of each crime that the defendant
15 under consideration is accused of having committed.

16 The defendant is under no obligation to prove
17 his innocence under our laws. He is presumed to be innocent
18 of any charge in the indictment, and that presumption is
19 sufficient to require an acquittal of a defendant unless
20 you, the jury, on all the evidence, are convinced beyond a
21 reasonable doubt of a defendant's guilt.

22 A reasonable doubt is one that arises out of
23 the evidence in the case or lack of evidence. A reasonable
24 doubt is one that appeals to your reason, to your judgment,
25 to your common sense and your experience. It is not a

1 gwds 3

2 caprice, it is not a whim and it is not a speculation, and
3 it is not an excuse to avoid performance of an unpleasant
4 duty. And it certainly is not sympathy for a defendant.

5 A reasonable doubt is such as would cause
6 prudent people to hesitate in acts of importance to them-
7 selves.

8 Putting it a little differently, if you are
9 confronted, as indeed you are here, with an important
10 decision and, after having reviewed all the factors that are
11 pertinent for that decision, you find yourself beset by
12 uncertainty and you are unsure of your judgment, then you
13 have a reasonable doubt.

14 Conversely, in that same situation, if you
15 have taken into account all the elements that pertain to
16 the problem and you find you have no real uncertainty, no
17 substantial reservation about your judgment, then you have
18 no reasonable doubt.

19 Proof beyond a reasonable doubt does not mean
20 proof to a positive certainty or proof beyond all possible
21 doubt. If the latter were the rule, few persons, however
22 guilty, could ever be convicted. It is practically impossible
23 for a person to be absolutely and completely convinced of
24 any kind of fact which we deal with in trials, facts which
25 in their nature are not susceptible of mathematical certainty.

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2 So that kind of certainty, as I have tried to indicate, is
3 not the test of reasonable doubt.

4 You have heard me sometimes refer to direct
5 evidence and to circumstantial evidence, and it is well to
6 explain now the difference between these two types of evi-
7 dence.

8 Direct evidence is where a witness testified
9 to what he saw, heard or observed, what he knows of his
10 own knowledge, something which comes to him by virtue of
11 his senses. Circumstantial evidence is evidence of facts
12 and circumstances from which one may infer connected facts
13 which reasonably follow in the common experience of mankind.

14 Stated somewhat differently, circumstantial
15 evidence is that evidence which tends to prove a disputed
16 fact by proof of other facts which have a logical tendency
17 to lead the mind to a conclusion that those facts exist
18 which are sought to be established.

19 Circumstantial evidence, if believed, is of
20 no less value than direct evidence, for in either case you
21 must be convinced beyond a reasonable doubt of the guilt
22 of a defendant.

23 Let's take one simple example, one which is
24 often used and may be applicable today in this courtroom,
25 to illustrate what is meant by circumstantial evidence.

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2 We will assume when you entered the courthouse
3 this morning the sun was shining brightly outside and it
4 was a clear day and there was no rain, the sky was clear.
5 Now, assume that somebody comes walking in through that door
6 into the courtroom with the blinds drawn and the drapes
7 down and you can't look outside, and assume that when you
8 are sitting in this jury box and despite the fact that you
9 remember it was dry when you came here this morning, some-
10 body walked in with an umbrella dripping water, followed
11 in a short while by a man in a raincoat and the raincoat
12 is wet.

13 Now, you haven't looked outside the courtroom
14 in the meantime to see whether it was raining or not, and
15 if you were asked whether it was raining you couldn't say
16 that you know it directly of your own observations because
17 you didn't look, but certainly upon the combination of facts
18 as given, even though when you entered the building it wasn't
19 raining outside, it would be reasonable and logical for you
20 to conclude from the circumstantial evidence that it is
21 raining now.

22 That is about all there is to circumstantial
23 evidence. You infer, on the basis of reason and experience
24 from an established fact, the existence of some further
25 fact.

1 gwds 6

2 There are times when different inferences
3 may be drawn from the facts, whether they are proved by
4 direct or circumstantial evidence. The government asks you
5 to draw one set of inferences while the defendants ask
6 you to draw another. It is for you to decide, for you
7 alone, what inferences you will draw.

8 In evaluating the evidence which has been
9 placed before you, you are required to determine the
10 reliability of the witnesses that you have heard and the
11 extent to which you can count on any or all of them for
12 accurate accounts of the facts. You have heard conflicting
13 stories from the witness stand. Credibility is a key
14 question in this case. You have had an opportunity to ob-
15 serve the witnesses as they testified. You want to be
16 asking yourselves, in thinking together, how each witness
17 impressed you. Did the witness appear to be truthful,
18 candid, frank, forthright, or did the witness seem to be
19 evasive, deliberately obtuse, shifty or suspect in some other
20 way? Was there inconsistency or disparity in what the
21 witness remembered and failed to recall, and was it explained
22 or explainable? Did the witness appear to know what he or
23 she was talking about, and did the witness impress you as
24 having a purpose to report his or her knowledge to you truth-
25 fully, fully and accurately? Was he or she consistent or

1 gwds 7

2 specifically contradictory? How did the manner and the
3 matter of his or her testimony on direct examination compare
4 with his or her manner or matter of the testimony on cross-
5 examination?

6 You should consider not only the intrinsic
7 persuasiveness of each person's testimony by itself but
8 its setting in the circumstances of the whole case.

9 For example, the degree to which any particular
10 item of testimony is corroborated or contradicted in the
11 case and all such things you test by your own mature evalua-
12 tion about life, about people and about human behavior.

13 A witness may be discredited or, as we say,
14 impeached by contradictory evidence or by evidence that he
15 or she made statements inconsistent with his or her testi-
16 mony on the witness stand.

17 Evidence that any witness, whether he be a
18 defendant or other, that he has been convicted in the past
19 of criminal conduct may be considered by you in determining
20 his credibility, by which is meant his worthiness of belief.

21 You should consider, among other things, the
22 question of intent or motive, if any, of the witness.

23 The witnesses have been identified, and they
24 have told you about their background and associations. You
25 may wish to consider whether the witness may have had induce-

1 gwds 8

2 ments or incentives or loyalties or motives to shade the
3 truth or biases of one kind of another that may have led
4 the witness consciously or not to give you less than a
5 completely accurate account of the facts he or she purported
6 to portray.

7 If you believe a witness has wilfully sworn
8 falsely before you, you are free to disregard all of the
9 testimony of that witness or, at your option, to accept and
10 credit only such parts of it as your judgment dictates should
11 be accepted. How much or how little you accept is to be
12 your decision.

13 You have also heard testimony from what we
14 call an expert witness. Although the general rule is that
15 witnesses are permitted to testify only as to facts and
16 may not express their opinions, the exception to this rule
17 is the opinion of a qualified expert on some particular
18 technical matter. The expert may testify as to his opinion
19 on a subject concerning which he has special knowledge.
20 This is allowed on the theory that the advice of one exper-
21 ienced and versed in special or technical subjects will
22 aid you.

23 The government called one expert witness in
24 this case, Mr. Ivan Braverman, who gave his opinion as to
25 the financial statements prepared by Bialek that appear in

1 gwds 9

2 the proxy statements. He told you it was his opinion that
3 the financial statements were improper and that the impro-
4 prieties he observed were not accidental but were rather
5 purposeful. We heard from another expert in this case
6 called on behalf of the defendant Mahler, who gave you his
7 opinions in respect to the requirements of the securities
8 laws.

9 In weighing expert testimony, you may con-
10 sider the expert's qualifications and opinions, his reasons,
11 if any, and give his testimony such weight as you feel it
12 deserves. As previously stated, expert opinion is purely
13 advisory and you may accept it or reject it entirely or
14 in part as you believe best. The determination of the
15 facts in this case rests solely with you.

16 The government called certain witnesses at
17 trial who by their testimony asserted that they were
18 accomplices in the crimes charges against the defendants
19 on trial.

20 In the prosecution of a crime, the government
21 is often called upon to use witnesses who are accomplices
22 in the commission of the crime itself. That doesn't make
23 them accomplices merely because they say so. That has to
24 be established beyond a reasonable doubt with proof to your
25 satisfaction. The government frequently must use such

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testimony because otherwise it would be difficult or impossible to detect or prosecute wrongdoers.

The testimony of an alleged accomplice is not to be rejected unless the jury thinks it has no weight. The fact that an alleged accomplice pleaded guilty or that the witness may have motives for testifying falsely does not necessarily show that the witness was testifying falsely.

If accomplices could not be used, there are many cases where there is real guilt and where conviction should be had and where convictions would not be obtainable. Their evidence is properly considered by the jury. Their testimony, however, must be examined and weighed by the jury with greater care and caution than the testimony given by an ordinary witness.

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It is the universal rule in the federal courts that a defendant may be convicted on the uncorroborated testimony of an accomplice. However, it should be pointed out that the government here does contend that it has offered corroboration and proof from other witnesses and by way of documents and records.

You have also heard testimony from both defendants. A defendant who has testified is to have his testimony assessed in the same way as you assess the credibility of any other witness. The greater a person's interest in the case, the stronger the temptation to testify falsely.

It is perfectly obvious to all of you that the men in this case with the deepest, greatest interest are the defendants. In appraising their credibility you may take the fact of interest into consideration.

However, it by no means follows that simply because a defendant has a vital interest in the end result he is not capable of telling a truthful, candid version of the facts. It would be for you to make the judgment of his believability under all the facts and circumstances in evidence.

Although there has been a fair amount of testimony, the issues which you are called upon to decide

1 hpds 2

2 seem to be relatively simple. Yet, I think it is desirable
3 to review in broad outline the contentions of each of the
4 partners. However, I caution you that in doing so, that
5 it is nonetheless your recollection of the evidence that
6 controls and not my statement of it or the contentions con-
7 cerning it, unless you agree, and that no inference is to
8 be drawn against the defendants from the manner or substance
9 of my review, or of my recollection, which in no event con-
10 trols your determination.

11 The evidence produced or elicited by the
12 government which it contends points to the guilt of the
13 defendants and its contentions thereon are as follows:
14 The two defendants before you on this trial, Mahler and
15 Ubben, are charged with both planning the crimes of stock
16 fraud, wire fraud and mail fraud in connection with the
17 stock of Industries International and also with actually
18 carrying out the crimes involved in that criminal plan.

19 The government contends that its evidence be-
20 fore you shows that in approximately four weeks the stock
21 of an allegedly worthless company, Industries International,
22 was marketed over-the-counter to unsuspecting members of
23 the public for upwards of one million dollars. The govern-
24 ment contends that it was these defendants, Mahler and Ubben,
25 who in conspiracy with each other and others whose names

1 hpds 3

2 have been called to your attention, were the moving forces
3 in the alleged scheme and that, in carrying out the alleged
4 scheme, that they acted both directly and indirectly,
5 through nominees and other devices, and concealed their
6 true roles from the investing public.

7 In brief, the government contends that In-
8 dustries International, Inc. was in reality nothing but a
9 paper reorganization of a dormant public shell with a worth-
10 less private company that was unable to pay its bills as
11 they came due; that this reorganization was an essential
12 part of the plan allegedly devised by Mahler and Ubben,
13 which called for obtaining controlling interests in Bell-Ko
14 Film Company, a shell corporation whose stock could be
15 publicly traded, and then merging Bell-Ko with International
16 Industries, Inc., a private company whose stock could not
17 be publicly traded, to form a new company called Industries
18 International, Inc.. That is was further part of the alleged
19 plan to exchange stock of the public shell, which was
20 allegedly secretly controlled by Mahler, Ubben and Zucker,
21 for stock of the new company and then, arranging through
22 intermediaries and brokers to whom alleged improper secret
23 gratuities were promised or paid, to get the stock of the
24 new company listed in the pink sheets.

25 That the next step in the alleged plan was

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2 to create by preplanned transactions the artificial appear-
3 ance of market activity in the stock of the new company
4 at advancing prices, and to create a demand for the stock
5 and lure the public and investors into trading in the stock
6 of Industries International which would allegedly allow
7 those on the inside, like Mahler and Ubben, to dispose of
8 their shares of stock which had cost them little or nothing
9 and which were really not worth anything.

10 The government contends that the essence of
11 this fraud was secrecy and non-disclosure and that a list
12 of the material facts which were not disclosed to the
13 public includes, among other things, the facts that the
14 company was worthless and insolvent; that the public shell
15 was secretly controlled by Mahler, Ubben and Zucker; that
16 a broker had to be bribed to get the stock listed for
17 trading in the pink sheets; that Mahler and Ubben controlled
18 large quantities of stock that they planned to distribute
19 to the public; that the stock that was marketed before the
20 SEC intervened was done so in pre-planned sales of nominee
21 stock at fixed prices; that private investors were falsely
22 promised free and tradable stock when none could be obtained
23 except through the unlawful use of nominee names; and, that
24 Mahler and Ubben had to forge, falsify, alter, backdate,
25 and destroy records and other documents to conceal what was

1 hpds 5

2 really going on.

3 The government contends that it has proven
4 each of these allegations. And, in response to Ubben's
5 claim of innocent reliance on others, the government points
6 to, among other proof, his alleged forging of the signature
7 of M. Reese on six opinion letters, and to his alleged
8 unauthorized use of nominee names on false documents, actions
9 which the government contends are inconsistent with any
10 claim of innocence.

11 Likewise, in response to Mahler's claims that
12 he was unaware of the alleged fraudulent acts being done
13 by Zucker and Kulekofsky, the government contends that this
14 claim is inconsistent with the fact that Mahler allegedly
15 was present at most of the key meetings in the alleged
16 fraud; that he is sophisticated in securities matters; that
17 he allegedly made the major decisions and that it was he,
18 not Zucker, who took the lead in, for example, allegedly
19 helping Ubben to obtain, or try to obtain, free stocks, in-
20 cluding both the Greenberg shares and the nominee shares.

21 The defendants deny that they committed the
22 frauds or engaged in any conspiracy to violate any federal
23 laws and contend that the government has failed to prove
24 them guilty beyond reasonable doubt. They rely on their
25 presumption of innocence and claim moreover that there is

1 hpds 6

2 reasonable doubt of their guilt.

3 The defendant Arnold Nelson Mahler further
4 contends that he was not a participant or member of any
5 scheme or plan to circumvent or violate the securities laws,
6 and that at all times his actions were fully legal and with-
7 out fraudulent purpose.

8 Mr. Mahler contends that in late 1972 and early
9 1973 he made frequent trips out of town and abroad, includ-
10 ing trips to Vermont, London, Africa and Greece, and en-
11 trusted the details of much of his merger and acquisition
12 business to Mr. Ted Zucker. In particular, Mr. Mahler con-
13 tends he left Mr. Zucker responsibility for the arrangements
14 of the Bell-Ko Film-International Industries merger which
15 is the subject of this case. Mr. Mahler contends that any
16 violations of the securities laws committed in pursuance
17 of this merger were committed by Mr. Zucker and Mr. Kulekofsk
18 and their associates without the knowledge or participation
19 of Mr. Mahler.

20 In particular, Mr. Mahler contends that the
21 evidence shows he had no reason to believe that there was
22 anything improper or deficient in the financial statements
23 or financial condition of International Industries, the
24 company which owned the Dri-Flo pump, that he never touted
25 the pump or promoted the company or its stock; and that he

1 hpds 7

2 never controlled, directly or indirectly, the management or
3 operations of the merged company.

4 Moreover, Mr. Mahler contends that he believed
5 that the merger of the companies had been properly consum-
6 mated and that a valid exemption for the sale of Mr. Mahler's
7 shares of stock was operable under SEC Rule 133. Mr. Mahler
8 contends that he had no knowledge of or complicity in un-
9 disclosed payments to brokers, the falsification or back-
10 dating of records, the prearranging of sales of stock, the
11 circumvention of SEC rules concerning freeing up of un-
12 registered stock, or the attempts by Mr. Zucker, Mr. Kulekofsk
13 and others to cover up wrongdoing.

14 Mr. Mahler contends that he left to Mr. Zucker
15 responsibility for the Bell-Ko-International Industries
16 merger, including acquisition of the shares and preparation
17 of the proxy statement.

18 Additionally, Mr. Mahler contends that
19 Mr. Zucker and Mr. Kulekofsky falsely shifted the blame for
20 the Industries International manipulation to Mr. Mahler,
21 made bargains with the government in exchange for testimony
22 against Mr. Mahler and then testified untruthfully against
23 Mr. Mahler.

24 Mr. Mahler contends that he was unaware of
25 and did not participate in any illegal aspects of the

1 hpds 8

2 Bell-Ko-International Industries merger, a merger he believed
3 had been properly and legally executed.

4 The defendant Dean Ubben further contends
5 that he intended to raise money for Industries International
6 honestly and legally and did not act with a fraudulent
7 purpose. Ubben also contends that he did not act with
8 criminal intent with respect to his fund raising activities
9 on behalf of Industries International.

10 Dean Ubben contends that he did not prepare
11 the Industries International sales projections and, in fact,
12 believed that they were honest forecasts of things to come.

13 He contends further that he did not bribe
14 brokers and that the claims of Wellens, Kulekofsky and
15 Zucker that he did are false. Mr. Ubben contends he told
16 all of the investors he solicited of Industries International
17 cash flow problems and plainly reported the fact that
18 Industries International was just beginning to sell pumps.

19 He contends that he had no idea of what facts
20 belonged in the Bell-Ko proxy and what facts did not and
21 that he relied on Harold Herman, the lawyer, and Ted Zucker
22 for the preparation of the proper proxy.

23 He contends that he was selling International
24 Industries stock in good faith reliance on two exemptions
25 from the registration requirements of the Securities Act

1 hpds 9

2 of 1933, and that when he sold restricted stock he believed
3 the private placement exemption applied. When he also
4 offered and promised investors free and tradable stock he
5 believed that the Rule 133 exemption applied.

6 With respect to the Rule 133 exemption, Ubben
7 contends that he relied on the assurances of Harold Herman,
8 the securities lawyer, that all the rules would be and then
9 had been complied with. Ubben also contends that Harold
10 Herman explicitly told him that the 164,000 Bell-Ko shares
11 that Ubben obtained claims on through two bills of sale
12 could be converted into Industries International free and
13 tradable shares and then broken down through the use of
14 nominees in order to get free and tradable stock to the in-
15 vestors and that such a course of action would be legal.

16 In respect to 40,000 shares of the Industries
17 International stock originally owned by Marvin Greenberg,
18 Dean Ubben maintains that he took no part in and had no
19 knowledge of the prearranged transactions the government
20 contends occurred.

21 Ubben contends that he took no part in the
22 over-the-counter transactions that occurred in 1973 in connec-
23 tion with the Greenberg shares and denies that he had con-
24 versation with Louis Kulekofsky about them.

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Now, in your deliberations you should not even consider the question of possible punishment of the defendants, that is to say, the question of punishment in the event you were to determine a defendant guilty. Under our system, the sentencing or punishment exclusively is a function of the Court, not the jury. Therefore, I ask you not to consider punishment or possible punishment at all in your deliberations in this case.

When you undertake your deliberations on this case in a few moments, use your common sense in evaluating the evidence and the probabilities. Don't allow yourselves to be confused with irrelevant detail, if you find there is any, or be swayed or carried away or inflamed by appeals to sympathy or passion. Suspicion or conjecture or prejudice should not be substituted for proof. You must maintain a calm, clear view of the case and not be sidetracked by anything or anybody from a fair, dispassionate consideration of the evidence in arriving at your resolution of the facts.

If, after your calm, clear review of the case, you find a reasonable doubt that a defendant has committed one or any or all of the offenses charged here, you should not hesitate to acquit him on such count or counts; but, on the other hand, if you find

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2 beyond a reasonable doubt that the law has been violated
3 as charged, you should not hesitate because of sympathy
4 or any other reason to render a verdict of guilty as a
5 clear warning that a crime of this character may not be
6 committed with impunity. The public is entitled to be
7 assured of this.

8 Your verdict must be rendered as to each
9 of the defendants Mahler and Ubben on each count. In
10 this regard, I want you to listen to each other carefully
11 in the jury room when you consider the matter. If you
12 think you are wrong and somebody else is right, don't
13 be embarrassed about changing your opinion. But remember
14 each of you has to decide the case for himself or herself.

15 The verdict of guilty or not guilty against
16 either defendant on any count as to which you are report-
17 ing to be acceptable must be unanimous.

18 You may, if you wish, report your verdicts
19 separately if that will aid you in your deliberations
20 as you from time to time reach some unanimity.

21 You have been provided with a copy of the
22 indictment and form of the verdict, and those will aid
23 you in recording what you have decided upon if you have
24 reached unanimity.

25 You are about to go into the jury room and

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2 begin your deliberations. During those deliberations,
3 if you desire any of the exhibits, those will be sent in
4 to you on request. If you want any of the testimony
5 read, that can be done. But please remember it is not
6 easy to find particular portions. So any request that you
7 do make through your spokesman must be in writing, and
8 your spokesman in this case will be Mrs. Estreicher, the
9 lady who sits in the first seat. The notes that you send
10 in to me should be signed by her, and please be as
11 specific as you possibly can.

12 Please do not communicate with anyone con-
13 cerning those deliberations about this case except in
14 writing signed by your spokesman, who will be provided
15 with pencil and paper by the marshal.

16 I want to take a moment to talk to the
17 lawyers. I may have misstated something or forgotten
18 something. I want to give them an opportunity to let
19 me know about it.

20 I will take them into the robing room so
21 that you can relax here while that is being done.

22 (In robing room.)

23 THE COURT: Are there any exceptions on
24 the part of the defendant Arnold Nelson Mahler?

25 MR. JANIS: Yes, yo'r Honor. It seems that

1 hpbr 1

1803

12 am

2 (In open court.)

3 THE COURT: Ladies and gentlemen, there
4 are no further statements that I feel called upon to make
5 to you. It seems to me that in all probability you
6 would prefer to go out to lunch now instead of an hour
7 from now. If so, the marshal will be instructed
8 accordingly.

9 If you decide when you want to go out to
10 lunch, you tell the marshal. He will then attempt to
11 make immediate arrangements. It is drizzling outside and
12 it may be it will take a little time to make those arrange-
13 ments.

14 So, if it will take a little time, you can
15 start your deliberations.

16 Swear the marshal.

17 (A marshal was sworn.)

18 THE COURT: Ladies and gentlemen, we have
19 here all of the 12 jurors who are hapily available for the
20 deliberations on the case. In this case I am not going to
21 discharge the alternates at this time but I am going to
22 separate the alternates from the jury. I will ask
23 the alternates to please proceed to Courtroom 109, downstairs,
24 and be available there, should there arise any circum-
25 stance that I may wish to call on you for. That means you

1 hpbr 2

2 can move around reasonably freely, you can go to your
3 lunches and come back, but identify yourselves to the
4 jury clerk. Please be absolutely sure -- I am addressing
5 the four alternates -- that you have no conversations with
6 anybody about this case, that you don't allow anybody
7 to approach you to discuss the case, whether it be another
8 fellow juror or somebody else, and if there is any incident
9 that you as a matter of common sense and good judgment
10 feel is something that needs to be reported, unhesitatingly
11 call it to the attention of the clerk downstairs or the
12 clerk in this room I want to know about it immediately.

13 You are not yet discharged from your sworn
14 duty. You are being merely held in reserve for the moment.
15 Please act accordingly.

16 Again, I repeat to you, you can move around
17 freely. You can't talk, you can't listen, you can't
18 be approached and you can't have any traffic with anyone
19 in any respect regarding this case and be very leery of
20 anyone who endeavors to engage you in any discussion of
21 any kind whether it is about the weather or otherwise.

22 The three ladies and the gentleman, do you
23 have any cloaks or papers in there? Would you please
24 go out there now and the marshal will see that you can get
25 your things. You can leave your papers behind. If you

1 hpbr 3

2 need them they will be returned to you.

3 As soon as those folks have gotten their
4 things, the jurors may go out and decide on your next
5 course of business, and also whether you want to eat out,
6 or eat in, and how fast it can be accomplished.

7 The government will take care of all that
8 through the marshal.

9 All parties in the courtroom are directed
10 to remain here until the alternates have cleared the
11 floor and the jurors have gone out to the jury room to
12 deliberate.

13 (Court's Exhibit 11, Mahler's contentions,
14 was marked.)

15 (At 12:20 p.m. the jury retired to deliberate
16 upon a verdict.)

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1 hpbr 10

2 MR. RAKOFF: Your Honor, we have two wit-
3 nesses, one is short and one is long.

4 THE COURT: Let's take the short one.

5 MR. RAKOFF: I didn't want to start the long
6 one unless your Honor wants to go straight to 5 o'clock --

7 THE COURT: There is no reason why we shouldn't
8 go through to 5 o'clock.

9 MR. RAKOFF: The government calls David
10 Norblom.

11 MR. BLACKSTONE: Your Honor, are we going to
12 have a mid-afternoon recess, five minutes?

13 THE COURT: You want a recess now?

14 MR. BLACKSTONE: Yes.

15 THE COURT: All right, ladies and gentlemen,
16 we will have a recess.

17 (Jury leaves the courtroom.)

18 THE COURT: Mr. Janis, you handed some kind of
19 paper up here. Let's look at it to see what it is.

20 MR. JANIS: Yes, your Honor.

21 (Handed.)

22 THE COURT: I have a curious objection as to
23 what the witness had to say. There is nothing in any
24 direction I had here to information given that warrants the
25 statement that is made here. There was no objection

1 hpbr 11

2 to the testimony that was voiced. The lawyers are free and
3 know they are free and have heretofore utilized their
4 right to make objections in open court and the only thing
5 that they are restricted from doing had to do with not
6 comment on the first trial, but comment on acquittals.
7 Frankly, in addition to not being factual, this Court
8 exhibit attempts to confuse what the plain instructions to
9 the lawyers are, and I will reiterate for the fifth, sixth
10 or seventh time that any evidence that is deemed to be ob-
11 jectionable or questioned as deemed to be objectionable
12 will have to be objected to at the time, and not as a matter
13 of second guessing or after a witness has departed from the
14 witness stand.

15 The only restriction has to do with airing
16 lawyers' opinions about why the objection is or isn't
17 sound, and that can be put on a memorandum paper. That the
18 jury are not interested in so far as consideration of the
19 evidence.

20 MR.JANIS: Your Honor, may I state something
21 for the record, please.

22 I understand the Court's ruling. With that
23 objection in particular, I thought it would be impossible
24 to just state objections without stating the grounds for
25 objections and I don't know how I could possibly have stated

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Certificate of Service

I certify that on March 17, 1978 I had delivered ^{one copy of} the
Appendix to Brief for Appellant Dean Ubben to Robert Fiske, Esq.,
One St. Andrews Plaza, New York, New York.

Donald S. Nawi

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